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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 541

FLORIDA EAST COAST RAILWAY COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al.*, *Appellees*

On Appeal from the United States District Court for the Middle District of Florida

JURISDICTIONAL STATEMENT

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September 1965

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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STATUTES CITED

Judicial Code (Title 28 United States Code):

Section 1253 2
Section 1336 2
Section 2101(b) 2
Sections 2321-2325 2

Interstate Commerce Act:

Section 1(18)-(20), 49 U.S.C. § 1(18)-(20) ..2, 3, 4, 11, 12

Bankruptcy Act:

Section 77, 11 U.S.C. § 205 3

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JURISDICTIONAL STATEMENT

Florida East Coast Railway Company (East Coast) appeals from the judgment of the United States District Court for the Middle District of Florida, entered May 19, 1965, dismissing a complaint to set aside orders of the Interstate Commerce Commission. East Coast submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS

The per curiam opinion of the three-judge District Court, entered on May 19, 1965, is reported at 242 F. Supp. 490. The opinion and judgment of the District Court are printed as Appendix A. The report of the Interstate Commerce Commission, Division 3, served December 31, 1964, including a concurring opinion and appendix, is reported at 324 I.C.C. 286 and printed as Appendix B. The unreported order of the Commission, Division 3, dated April 21, 1965, denying further hearing and reconsideration, is printed as Appendix C.

JURISDICTION

This action was brought under 28 U.S.C. §§ 1336 and 2321-2325 to set aside orders of the Commission entered under § 1(18)-(20) of the Interstate Commerce Act, 49 U.S.C. § 1(18)-(20). The Southern Railway Company and its affiliates in the Southern Railway System (collectively) Southern, intervened as parties plaintiff. The United States and the Commission answered. Atlantic Coast Line Railroad Company (Coast Line), A. Duda & Sons, Inc., and Duda & Sons Cooperative Association (collectively, Duda) intervened as parties defendant.

The judgment of the District Court was entered May 19, 1965. Notice of appeal was filed July 7, 1965. The Supreme Court has jurisdiction under 28 U.S.C. §§ 1253 and 2101(b) to review the judgment below on direct appeal. This jurisdiction is sustained by decisions in *Chicago & North Western Railway Company* v. *Chicago, Milwaukee, St. Paul & Pacific Railway Company,* 380 U.S. 448 (1965), and *Southern Railway Company* v. *North Carolina,* 376 U.S. 93 (1964).

STATUTE INVOLVED

Section 1(18)-(20) of the Interstate Commerce Act, 49 U.S.C. § 1(18)-(20), is printed as Appendix D.

QUESTION PRESENTED

May the Commission, under section 1(18) of the Interstate Commerce Act, authorize a railroad to construct an extended line of railroad to meet the desires of a single shipper when the public will be permitted to use the new line only with the consent of that shipper?

STATEMENT OF THE CASE

East Coast and Coast Line are interstate railroads. East Coast operates a main line of railroad along the east coast of Florida between Jacksonville and Miami. East Coast also operates a branch line between Fort Pierce and Lake Harbor, Florida. On January 1, 1961, East Coast emerged from reorganization proceedings under § 77 of the Bankruptcy Act, 11 U.S.C. § 205. *Florida East Coast Railway Company, Reorganization,* 307 I.C.C. 5 (1958). East Coast was operated under receivership or trusteeship for some 30 years prior to this reorganization. See *St. Joe Paper Company* v. *Atlantic Coast Line Railroad Company,* 347 U.S. 298 (1954). East Coast had gross railway operating revenues of $28,745,649 and net operating income of $3,111,434 during 1961.

The predominant movement of traffic over East Coast's line is southbound freight received in interchange at Jacksonville from Coast Line, Seaboard Air Line Railroad Company, and Southern. Relatively little northbound interstate rail freight traffic is generated in the area of Florida served by East Coast,

with the exception of fruits and vegetables. Northbound fruit and vegetable shipments are therefore of immense importance to the operations of East Coast (324 I.C.C. at 304-305; Appendix B, pp. 28b-29b).

Coast Line, one of the nation's major railroad systems (324 I.C.C. at 294; Appendix B, p. 12b), operates a network of lines in Virginia, North and South Carolina, Georgia, Alabama, and Florida. For the year 1961, Coast Line had gross railway operating revenues of $162,383,705 and net operating income of $17,644,002.

Coast Line filed July 10, 1963, an application under section 1(18) of the Interstate Commerce Act for authority to extend its line into an area south and east of Lake Okeechobee, Florida. Vegetables and sugar cane have been grown in this area for at least 15 years (Tr. 218-220)* and have been trucked to packing houses, pre-cooling and loading facilities located at Belle Glade, a station on the Fort Pierce-Lake Harbor branch of East Coast (Tr. 153, 192, 362-363). Shipments of vegetables, raw sugar, and molasses are handled by East Coast from Belle Glade to Jacksonville for interchange with other rail carriers (324 I.C.C. at 304-305; Appendix B, pp. 28b-29b). Approximately eight per cent of East Coast's gross operating revenues for 1961 was attributable to northbound traffic originated on the Fort Pierce-Lake Harbor branch.

The Coast Line extension was designed to serve a plant to be built by Duda outside of Belle Glade and a then-existing plant of South Florida Sugar Company, Inc. (South Florida Sugar). Neither location was

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* Reference to the record will be indicated by the following abbreviations:

Tr.—Transcript of hearing before the Commission.

Ex.—Exhibits introduced at the hearing.

served directly by a rail line. At the hearing there was testimony that another vegetable grower and packer—Gressinger & Sons—proposed to abandon a plant located on the East Coast line at Belle Glade and either to arrange for Duda to pack Gressinger vegetables or to erect a facility at the Duda location for this purpose (Tr. 147). No definite agreement had been made, however, by Gressinger with Duda (Tr. 198).

Duda has been a principal shipper of vegetables over the East Coast at Belle Glade for many years. East Coast handled an average of 11,279 cars of fresh vegetables from Belle Glade during each of the nine growing and shipping seasons beginning 1953-54 and ending 1961-62. Duda's shipments averaged 15 per cent of this traffic (Ex. 20B; 324 I.C.C. at 304; Appendix B, p. 28b). East Coast revenues from Duda traffic were $1,168,982 in the five seasons from 1959-60 through 1963-64, or an average of $233,796 per season. Gressinger has also shipped for a number of years from Belle Glade, although in substantially smaller volume than Duda.

East Coast protested the application of Coast Line and subsequently, on September 13, 1963, filed a competing application. East Coast proposed an extension of its Fort Pierce-Lake Harbor branch southward to the proposed new Duda plant and to the existing mill of South Florida Sugar. East Coast, unlike Coast Line, located and designed its line not merely to serve Duda and South Florida Sugar but also to improve service to other shippers in the area. Coast Line protested the application of East Coast. Southern intervened to support East Coast and oppose Coast Line.

Consolidated hearing on the two applications was held before an Examiner of the Commission, who recommended that the East Coast application be denied and the Coast Line's granted (324 I.C.C. at 308;

Appendix B, p. 34). East Coast and Southern excepted to the Examiner's recommended order, and Coast Line replied.

Division 3 of the Commission, after oral argument, affirmed the result recommended by the Examiner, concluding that "the public convenience and necessity require the extension of a rail line into the new territory" (324 I.C.C. at 291; Appendix B, p. 7b). The Commission based its conclusion on a finding that Gressinger and Duda are determined, regardless of the outcome of these proceedings, to move their facilities from Belle Glade to the new Duda plant (324 I.C.C. at 290; Appendix B, p. 6b). To find public need for the new line, the Commission also relied on the need of South Florida Sugar for direct rail service at its sugar mill (324 I.C.C. at 291; Appendix B, p. 8b). The Commission concluded that permitting Coast Line to construct its proposed extension "would not unduly disturb the competitive situation in the affected area"[1] (324 I.C.C. at 295; Appendix B, p. 13b).

The denial of East Coast's application apparently rested on two propositions: (1) East Coast should have

[1] This conclusion is contrary to that expressed in 1947 when Coast Line was refused permission to extend its line into this same area:

> The contention of the East Coast that it has an exclusive right to serve the territory to be reached by the proposed line of the Atlantic Coast is not controlling but the fear that the latter may divert a substantial volume of the East Coast's existing vegetable traffic from the territory along Highway No. 25, is not without foundation. . . . It is shown that the East Coast provides rail-transportation service for the shippers of agricultural produce from the general territory along Highway No. 25. Under that circumstance, it cannot be concluded that public convenience and necessity require the Atlantic Coast to extend its lines into that territory. *Atlantic Coast Line Railroad Company, Construction,* 267 I.C.C. 803 (1947); not printed in full.

extended its line at some earlier time to a plant site selected by Duda (324 I.C.C. at 290, 295; Appendix B, pp. 5b, 13b); (2) East Coast was not capable, financially and otherwise, of completing the proposed construction[2] (324 I.C.C. at 292, 295; Appendix B, pp. 9b, 12b). One Commissioner concurred in the result but noted the destructive consequences to East Coast and the ever-widening detrimental impact for shippers relying on East Coast service (324 I.C.C. at 297; Appendix B, p. 15b). The decision of the Commission, Division 3, was administratively final.

East Coast filed January 15, 1965, the complaint in the court below to set aside and enjoin the Commission's orders. While the complaint was pending, East Coast learned that the mill of South Florida Sugar was to be dismantled and that there was no future need for rail service to or from that mill. East Coast promptly moved the District Court to remand the proceedings and, at the same time, petitioned the Commission to reopen the proceedings for further hearing and reconsideration on the ground that this development altered the essential bases—including costs, relative financial ability, and traffic patterns—for disposition of the competing applications.[3] East Coast noted that elimina-

[2] The Commission had, however, approved on April 24, 1964, an application by East Coast to borrow $6,000,000 for *inter alia* additions to its line of railroad. *Florida East Coast Railway Company, Notes,* Finance Docket No. 23061 (unreported order). As of October 16, 1964, East Coast had used only $2,000,000 of the $6,000,000, and the Commission extended to December 31, 1965, the period during which East Coast could issue notes to secure the balance of $4,000,000.

[3] For example, East Coast would eliminate construction of approximately ten miles of track by not extending its line to the abandoned South Florida Sugar mill. Based on estimated total construction costs of $2,212,963 (324 I.C.C. at 300; Appendix B, p. 21b) for the original 17 mile extension, the average cost per mile would be $130,175.

tion of the South Florida Sugar mill emphasized the "private" character of Coast Line's extension by removing the only potential shipper whose access to the line would not be controlled by Duda. The Commission, Division 3, by order dated April 21, 1965, denied East Coast's petition and refused to reopen the proceedings or to reconsider its prior orders.[4] The Commission concluded in the order of April 21, 1965, that (1) despite the elimination of South Florida Sugar, rail service to Duda and Gressinger constituted sufficient public convenience and necessity to justify grant of Coast Line's application; and (2) nothing in the changed circumstances altered East Coast's inability to go forward with its proposal (Appendix C, pp. 1c 2c).

On May 19, 1965, the District Court entered an opinion and judgment dismissing the complaint and affirming the Commission's orders. The District Court found that the orders were supported by substantial evidence and that the proposed Coast Line extension was a public facility (242 F. Supp. at 492; Appendix A, pp. 2a, 3a). The District Court also held that elimination of the South Florida Sugar mill was not such a change in circumstances as required the Commission to reopen the proceedings for reconsideration (242 F. Supp. at 493; Appendix A, p. 5a).

THE QUESTION IS SUBSTANTIAL

May the Commission, in applying the standard of "public convenience and necessity," authorize a rail-

[4] The Commission has held that it retains jurisdiction to modify and reconsider its orders, without leave of court, during judicial review proceedings. See *Atchison, Topeka and Santa Fe Railway Company* v. *United States*, 231 F. Supp. 422 (ND Ill. 1964).

road to construct an extension that will serve the interests of a single shipper; an extension that can be used by other potential shippers—such as Gressinger & Sons—only with the consent of Duda?

The question is important to carriers and to shippers. It has never been decided by this Court.

The elimination of South Florida Sugar as a potential user of Coast Line's extension renders the construction a private line for Duda. The Commission and the Court below rely on Gressinger's use of the line to find a public benefit, but Gressinger's use of this rail facility is now and will be in the future dependent on Duda's prior consent. Only if Gressinger makes an agreement satisfactory to Duda can Gressinger actually use the line. If this amounts to public convenience and necessity, every large shipper can have a rail line built at railroad expense on the shipper's private property.[5]

Payment for construction of extended lines to meet the particular desires of large shippers is an important issue to small railroads such as East Coast in the competitive struggle for traffic with major railroad systems such as Coast Line. The Commission's application of the statutory standard of "public convenience and necessity" in this case imposes responsibility for constructing privately controlled facilities on the railroad rather than the shipper. The fact that East Coast, while in bankruptcy, had not built a line to the plant site of Duda's selection, was a major factor in denial of the East Coast's application. The Commis-

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[5] The public will not be permitted use of adjacent land to reach the proposed Coast Line extension (Tr. 185). The Commission found that there would be no public use of the Coast Line extension at any point other than the Duda plant site and—when in existence—the South Florida Sugar mill (324 I.C.C. at 294; Appendix B, p. 11b).

sion's reliance on this fact emphasizes the nature and importance of the decisions below[6] (324 I.C.C. at 289, 290, 295, 302, 307; Appendix B, pp. 5b, 7b, 13b, 25b, 33b). Under the Commission's interpretation of the statutory standards, East Coast can not hope to compete with Coast Line in building private rail lines for large shippers.[7] The decision will inevitably weaken existing rail service, as the concurring Commissioner noted, with ever-widening destructive impact on the public relying on East Coast service.

The issue is also important to shippers. Construction of rail lines at railroad expense for economically powerful shippers confers substantial competitive advantages not available to all shippers. Duda, for example, expects to realize a cost advantage from the location of a rail line at the point most desirable and efficient for Duda's packing operations (Tr. 137). There are, however, other shippers in the area—competitors of Duda—now denied these advantages (Tr. 301-302, 313, 324, 329).

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[6] The Commission, in its report in these proceedings, criticizes the failure of East Coast to build at railroad expense a line designed to serve *only* Duda. The record establishes that Duda asked Coast Line to build and pay for the line when Duda learned that East Coast had not paid for a line built to the plant of another shipper in the vicinity of Belle Glade (Tr. 139). Gressinger was not suggested as a potential shipper over the line to Duda's plant site until Gressinger was solicited in 1962 by the Coast Line to consider moving to Duda's site (Tr. 197-198).

[7] Coast Line, as the larger carrier with more extensive financial resources, would clearly prevail in a competitive struggle to build private rail lines. Coast Line, the long-haul carrier, will also clearly prevail if it is permitted, as here, to predicate anticipated revenues from the extension on the longest haul over its routes, compared with the lesser return East Coast could expect from its abbreviated haul to a point of interchange with connecting carriers.

The Commission and the courts have consistently held in the past that certificates of public convenience and necessity may be issued only upon a showing of strong and urgent *public* need for the proposed service. *Utah Terminal Railway Company, Construction,* 72 I.C.C. 89 (1922); *Galesburg & Great Eastern Railroad Company, Construction,* 244 I.C.C. 470 (1941); *Chesapeake & Ohio Railway Company, Construction,* 267 I.C.C. 665 (1947); *Northern Pacific Railway Company, Construction,* 295 I.C.C. 281 (1956); *cf. Chicago, Rock Island & Pacific Railroad Company* v. *United States,* 205 F. Supp. 378 (ND Ill. 1962). To be sure, construction of a rail line to a single plant or facility may result in a general public benefit. For example, the line may reach a facility that will consume important quantities of raw materials such as coal or timber, and the inbound shipment of these materials may benefit numerous suppliers and assist the economy of an entire area, as in *Louisville & Nashville Railroad Company, Construction,* 312 I.C.C. 169 (1960); *Chicago, Burlington & Quincy Railroad Company, Construction,* 282 I.C.C. 539 (1952); and *Chicago, Rock Island & Pacific Railroad Company* v. *United States,* 205 F. Supp. 378 (ND Ill. 1962). There is no claim here, however, that any area other than Duda's land or any person other than Duda, or those permitted by Duda to use the rail line, will benefit from this construction.

This Court explained the objectives underlying enactment of section 1(18) in *Texas & Pacific Railroad Company* v. *Gulf, Colorado & Santa Fe Railway Company,* 270 U.S. 266 (1926):

> Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of

> the earning capacity and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. The act sought, among other things, to avert such losses. 270 U.S. at 277-278 (citations omitted).

The interpretation and application of section 1(18) adopted by the Commission and sanctioned by the lower court in this case are not consistent with these statutory objectives.

For these reasons, the question presented by this appeal is substantial and is of such public importance as to require plenary consideration.

Respectfully submitted,

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September 1965

APPENDIX

APPENDIX A

[242 F. Supp. 490]

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE MIDDLE DISTRICT OF FLORIDA

No. 65-12-Civ.-J

FLORIDA EAST COAST RAILWAY COMPANY, *Plaintiff*,

and

SOUTHERN RAILWAY COMPANY, et al, *Intervening Plaintiffs*,

v.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION, *Defendants*,

and

ATLANTIC COAST LINE RAILROAD COMPANY, A. DUDA & SONS, INC., and A. DUDA & SONS COOPERATIVE ASSOCIATION, *Intervening Defendants*.

May 1965

Before JONES, Circuit Judge, and SIMPSON and MCRAE, District Judges

PER CURIAM:

The Atlantic Coast Line Railroad Company (A C L) applied to the Interstate Commerce Commission for a certificate of public convenience and necessity to construct, in Palm Beach County, Florida, an extension of an existing rail line, now terminating at the Okeelanta sugar mill, a distance of 6.5 miles east, and from this point it was proposed that one branch would run north 2.5 miles to the site of a packing house and precooling plant which A. Duda & Sons (Duda) proposed to build, and another branch would run south to the mill of the South Florida Sugar Company. The proceeding instituted by this application is the Commission's Finance Docket No. 22696. The

Florida East Coast Railway Company (F E C) protested the granting of a certificate to the A C L and sought on its own behalf a certificate for the extension of an existing rail line from a sugar mill near Belle Glade, Florida, south and southeast, for a distance of about ten miles, through the property of Duda and others to the mill of the South Florida Sugar Company. The proceeding instituted by the F E C application is the Commission's Finance Docket No. 22777. The Commission granted the A C L application and issued a certificate of public convenience and necessity to it. The application of the F E C was denied.

The F E C has brought this action to enjoin, annul and set aside the order of the Commission. The Commission's order has been stayed by a preliminary injunction of this court. The Southern Railway and five affiliated companies (Southern) were permitted to intervene as plaintiffs. A C L and Duda were permitted to intervene as defendants. Southern filed a complaint, claiming it would lose interchange traffic at Jacksonville. The defendants and intervening defendants answered. A hearing was had on April 12, 1965, and a transcript of the proceedings before the Commission, with its report and order,[1] was offered and received in evidence. At the outset, the primary function of this Three-Judge statutory court[2] is to determine whether there is substantial evidence on the record as a whole to support the findings of the Commission, and whether it had applied proper legal standards in the conduct of the proceedings before it and in conclusions which it reaches.[3]

The F E C urges that the proposal of A C L is not, in fact, for a line of rail to serve the public but is rather for

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[1] ICC Finance Docket 22696, 22777.

[2] 28 U.S.C.A. §§ 1336, 1398, 2321-2325.

[3] The effect of matters arising since the entry of the Commission's order, which is here under review, will be hereafter considered.

two private lines, one to serve Duda and the other to serve South Florida Sugar. The Commission considered the "private line" contention of the F E C and rejected it. This court has also given consideration to the question and finds it to be without merit. It is true that the greater part of shipments over the northerly leg of the A C L extension will, at the outset, originate with Duda and consist of vegetables produced by it or by the members of the Duda cooperative. But Gressinger & Sons, who will either use the Duda facility or erect one of its own, are substantial producers and will become substantial shippers on the A C L extension.

The Commission, in its opinion, mentioned a number of matters with respect to the F E C application. It pointed out that a small part of the extension would be over a spur owned by a shipper and not by the railroad, that the cost of its proposed extension would exceed the authorization of its board of directors, that meaningful studies of the terrain to be traversed had not been made, that no commitments for a right-of-way had been secured, and that adequate financing had not been shown. As to some of these, the F E C says that the Commission's statements are immaterial, overstressed or unsubstantiated. As to others, the F E C says that if the hearings on the two applications had been postponed, the omissions would have been supplied. The application of the A C L was filed on July 10, 1963, and was originally scheduled for hearing on September 24, 1963. The F E C filed its application on September 13, 1963.

The necessity for a prompt hearing was recognized, not only by the Commission but by the F E C, and the only postponement sought by it was to permit it to give a required notice and permit its application to be heard with that of the A C L. The Commission found that the F E C had ample time for preparation and we find no fault with this determination.

The decision to be made here is to be resolved upon the basis of whether the evidence in the record before us of the proceedings before the Commission sustains the finding that public convenience and necessity required the granting of the A C L application and the denial of the F E C application. We can reach no conclusion other than that the finding is supported by substantial evidence and the Commission's decision must be upheld.

The F E C insists that the Commission's order permits an invasion of its territory by the A C L. We think the Commission was fully justified in its finding that the territory to be served by each of the proposed extensions was not being served by any rail line.

The F E C attempted to make a showing that its existing service might be impaired and its economic stability jeopardized by the granting of the A C L application and the denial of the F E C application. The Commission believed, and we agree, that the showing was insufficient to tip the scale in favor of the F E C in the contest between the two railroads.

The Commission found that the loss of traffic and revenue by Southern as a result of granting the A C L application would be minimal. Its complaint is dismissed.

On the day of the hearing before this court, the F E C reported to the court that it was informed that the owners of the South Florida Sugar Mill had sold its properties and that the mill would cease operations and be dismantled. It moved for a remand to the Commission for a further hearing and reconsideration in light of changed circumstances. Duda asked for leave to take testimony or, in the alternative, to strike an affidavit submitted by F E C in support of its motion. On the same day as the hearing before the court, a petition was filed with the Commission for reopening, a further hearing and consideration. While the cause was under submission before

the court, the Commission entered an order finding that the loss of the sugar mill was not such a factor as would affect the need for construction of the A C L extension to the other area to be served. The Commission declined to reopen and reconsider. We cannot say that any showing was made requiring it to do so.

Other matters raised by the F E C have been considered and are found to be without merit. The preliminary injunction is vacated and set aside. The order of the Interstate Commerce Commission here under review is affirmed and the complaint is dismissed. An appropriate order will be entered. This opinion will constitute the findings and conclusions of the court.

In accordance with the opinion herein filed this day, it is

ORDERED and ADJUDGED that the preliminary injunction of this court staying the order of the Interstate Commerce Commission dated December 18, 1964, in its Finance Docket No. 22696, and Finance Docket No. 22777, is hereby vacated and set aside, and said order is in all respects hereby affirmed, and the complaint herein is hereby dismissed.

It is further ORDERED and ADJUDGED that the complaint of Southern Railway Company and its affiliates is hereby dismissed.

DONE and ORDERED at Jacksonville, Florida, this 19th day of May, 1965.

APPENDIX B

[324 I.C.C. 286]

FINANCE DOCKET No. 22696[1]

ATLANTIC COAST LINE RAILROAD COMPANY ET AL. CONSTRUCTION

Decided December 18, 1964

1. In Finance Docket No. 22696, certificate issued authorizing construction by the Atlantic Coast Line Railroad Company of an extension to its Okeelanta branch line of railroad in Palm Beach County, Fla. Condition prescribed.
2. In Finance Docket No. 22777, present and future public convenience and necessity not shown to require construction by the Florida East Coast Railway Company in Palm Beach County, Fla., and application denied.

Phil C. Beverly, Charles B. Evans, Prime F. Osborn, A. Alvis Layne, William A. Chesnutt, and *T. C. Maurer* for applicants.

James A. Bistline and *Peter S. Craig* for intervener.

James L. Graham, Jr., for Florida Public Utilities Commission.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS TUGGLE, MURPHY, AND WALRATH

TUGGLE, *Commissioner:*

Exceptions to the hearing examiner's report and recommended certificate and order have been filed by the Florida

[1] This report also embraces Finance Docket No. 22777, Florida East Coast Railway Company Construction.

East Coast Railway Company (East Coast), and by the Southern Railway Company (Southern), and the Atlantic Coast Line Railroad Company (Coast Line) has replied.[2]

By application filed July 10, 1963, in Finance Docket No. 22696, Coast Line seeks authority under section 1(18) of the act to construct and operate, in Palm Beach County, Fla., a line of railroad extending eastward from the present terminus of its branch near Okeelanta to a packinghouse and precooling plant to be constructed by A. Duda & Sons, Inc. (Duda), with additional trackage extending south to the sugar mill of the South Florida Sugar Company (Serralles), approximately 12.9 miles in all.

By application filed September 13, 1963, in Finance Docket No. 22777, East Coast also requests authority under section 1(18) of the act to extend its branch line of railroad from an existing spur owned by the Sugar Cane Growers Cooperative (Co-op), northeast of Belle Glade,[3] to the sugar mill of Serralles, approximately 17.3 miles, in Palm Beach County. Each applicant proposes to serve the same shippers and each has protested the other's application. The Railway Labor Executives' Association also protested the application of East Coast.

A consolidated hearing was held at which Southern intervened in opposition to Coast Line and in support of East Coast, contending that approval of Coast Line's application would result in considerable diversion of the area's traffic, some of which Southern handles north of Jacksonville, Fla. The Florida Public Utilities Commission was represented at the hearing in support of Coast Line's application, but it took no position with respect to that of East Coast. Briefs were filed by both applicants and by

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[2] East Coast, Southern, and Coast Line are common carriers by railroad subject to the provisions of part I of the Interstate Commerce Act.

[3] All points herein named are in Florida.

Southern and a report and recommended certificate and order of the hearing examiner were served.

Pertinent excerpts from the hearing examiner's report are appended hereto. The findings and conclusions set forth in the appendix are adopted as our own and will not be restated except briefly where necessary for clarity in discussion. Exceptions and arguments not specifically discussed herein have been considered and found to be without merit.

As set forth in detail in the appendix, the applicants are seeking authority to serve a newly reclaimed area of the Florida Everglades south of Lake Okeechobee to which two vegetable producers, Duda and Gressinger & Sons (Gressinger), are moving their processing facilities. The processing has been done at Belle Glade, a point served by East Coast, but the facilities there are considered inadequate by the vegetable producers because, among other reasons, the transportation facilities have become congested, and, in the case of Duda, its vegetable pre-cooling plant burned down. The newly reclaimed area to the south is also the locale of a new sugarcane mill operated by Serralles. At present Serralles has no rail service at the mill, but would like to have it.

The hearing examiner recommended approval of Coast Line's application and denial of East Coast's. He found, among other things, that, even if East Coast could project its line from the Co-op's spur, a certificate of public convenience and necessity permitting operations over the spur would be required before East Coast could lawfully operate from its main line to the beginning of the proposed construction; that the formula of 50 percent of freight operating ratio used by East Coast in determining out-of-pocket cost of handling the traffic of the proposed extension on other parts of its system materially underestimates the expense of movements; that there is no evidence of record that East Coast's service over its Fort Pierce-Lake Harbor

branch will substantially deteriorate or be curtailed to any great extent as a result of Coast Line's application being approved; that the territory where Duda and Gressinger propose to move is a new vegetable producing area; and that Coast Line's extension into such area cannot be considered an invasion, but, that even if it were, East Coast has no exclusive right to occupancy. The hearing examiner also found that Southern's interests would be adequately protected by the condition imposed in *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line,* 320 I.C.C. 122, requiring that the Jacksonville gateway be opened to Southern on all Florida traffic on a reciprocal basis.

East Coast, on exceptions and at oral argument, engaged mostly in an elaboration upon the contentions it had made at the hearing and on brief—contentions extensively discussed and disposed of in the appendix. It bases its case on the broad discussions of the purposes of section 1(18) of the act contained in *Texas & P. Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.,* 270 U.S. 266, 277, 278 (1926), and in *Chicago, R. I. & P. R. Co.* v. *United States,* 205 F. Supp. 378, 381 (1962), where those purposes were stated to be:

> (1) to prevent improvident and unnecessary expenditures for the construction and operation of lines not needed to insure adequate service; (2) to protect interstate carriers from weakening themselves by constructing and operating superfluous lines; (3) to protect interstate carriers from being weakened by another carrier's operation in interstate commerce of a competing line not required in the public interest; and (4) to preserve well balanced competition.

East Coast contends that its proposed line would be shorter than anything Coast Line could construct into the involved area and would serve more shippers. Coast Line's project, it declares, would be a mere "private" line serving only two shippers, Serralles, and the Duda-Gressinger interests, instead of the public at large.

Referring to its previous unwillingness to construct a line into the territory at its own expense, East Coast argues that had it done so upon the request of Duda, it would have had to build extensive lines to the properties of several other shippers as well. It asks that its refusal to extend in the past not be viewed as indicating a lack of interest in the territory or the traffic generated there.

East Coast persists in its argument, discussed in the appendix, that the territory Coast Line seeks to serve was found to be territory of East Coast in Finance Docket No. 15335, *Atlantic Coast Line R. Co. Construction,* 267 I.C.C. 803 (not printed in full), decided August 25, 1947 (1947 case). It asserts that Coast Line's invasion of this territory and diversion of Duda and Gressinger traffic would endanger East Coast's entire operation of the Fort Pierce-Lake Harbor branch. The revenues from this branch are said to contribute nearly 50 percent of East Coast's net railway operating income ($303,071 of $644,558 in 1961). Duda accounts for 15 percent of the outbound vegetable traffic on the branch from Belle Glade, and East Coast expresses fear that its loss could precipitate the downfall of the branch, which in turn would deprive other shippers located on the branch of the rail service upon which they depend. Cited in support of the invasion argument is *Northern Pac. Ry. Co. Construction,* 295 I.C.C. 281, wherein the Commission denied an application of one railroad for authority to construct 4 miles of branch line into an industrial area already adequately served by another.

The new vegetable producing territory, contrary to the contention of East Coast, was not set aside by the decision in the 1947 case as the exclusive preserve of that carrier. A carrier does not have a right to exclusive occupancy of a territory. See *Gulf, M. & O. R. Co. Construction,* 271 I.C.C. 541, 552. The authority sought by Coast Line in the 1947 case to extend its branch beyond Okeelanta Mill was denied, not because the extension would be an invasion

of another carrier's territory, but because there was not necessity for additional rail service in the territory at that time. In fact, East Coast's application for authority to construct a line into the territory, embraced in the 1947 case, was denied at the same time for the same reason.

The situation has changed since the 1947 decision. Vast acreage, formerly wilderness, has been reclaimed, rendered tillable, and converted to territory of great commercial value. For example, in the 1961-62 growing season Duda had 2,700 acres planted in vegetables north of the Bolles Canal, which acreage, due to the lifting of sugar production quotas, has since been converted to sugar. To accommodate the displaced vegetables, Duda went into a crash program of land development south of that canal.

In addition, the traffic congestion and crowded conditions in Belle Glade have become a serious encumbrance on commerce. As one witness described it, "* * * you have limited, outmoded facilities, limited trackage, severe congestion, and delays in getting our products under refrigeration—with a great deal of confusion. We are put at a great disadvantage which we can no longer tolerate." Buildings are close together, creating a fire hazard. A number of fires were reported, one of which destroyed the Duda facility.

Gressinger and Duda are determined, regardless of the outcome of these proceedings, to move their vegetable handling facilities from Belle Glade to the newly developed territory and shift their vegetable growing operations south of the Bolles Canal. Duda's representative testified that rail service is mandatory, in an economic sense, to the marketing of the vegetables, and desirable, as well, for inbound shipments of the agricultural supplies, machinery, and equipment used in the vegetable and sugarcane operations. But, without the extension of rail service sought herein, this shipper plans to market as much as possible by truck from the new territory, perhaps with piggyback

coordination at Coast Line's Okeelanta terminus. The economic penalty of operating by the joint motor-rail mode was said to be preferable to the penalty of operating through the facilities at Belle Glade.

A number of shippers approached East Coast on the matter of extending its line south of Belle Glade into the new territory, and, as discussed with some detail in the appendix, negotiations were not successful. It is sufficient to note at this point that East Coast was afforded an opportunity to follow the vegetable farming into the new territory and refused to do so, except at shippers' expense.

There is no evidence that it has attempted to pursue the opportunity even in view of Duda's manifest intention to move, nor that it had made any offer to construct the line requested by its shippers. It is clear that East Coast stood unmoved by the beckoning of the new territory and the importunities of the shippers; that is, until the Coast Line proposal was filed. Now it is willing to acknowledge the need for an extension of rail service into the new territory. This situation hardly can be said to portray an invasion by one carrier into the territory of another. The *Northern Pac. R. Co. Construction* case, *supra,* cited by East Coast is inapposite, since it involved a situation where the disputed territory was already receiving adequate rail service from another carrier physically present therein. Unlike that case, there is no rail service at present in the territory involved here, and consequently there is no rail competition therein to be affected by the construction of a new line by either applicant.

It is our conclusion at this point that due to the changes in the affected area since 1947, the public convenience and necessity require the extension of a rail line into the new territory. The remaining questions require us to either select from between the two applicants, grant the authority sought by both, or to deny both applications.

East Coast, in its exceptions, expressed skepticism as to the existence of a strong or urgent public need for additional rail service in the area. Explaining its own application as a reaction to the pressure of Coast Line and Duda, necessary (as lesser of two evils) to preserve its revenues and avoid disintegration of its entire line, it urged that it "be permitted to enjoy the increase of the area and * * * be protected against destructive competition from [Coast Line]."

At oral argument East Coast took a different tack, positively acknowledging that the public convenience and necessity require the new construction in the area by East Coast. The contention is that East Coast's extension would be available to meet the needs of many shippers while that proposed by Coast Line would be dependent upon serving a single shipper.

We do not agree with East Coast that the new line proposed by Coast Line would be a mere "private line." Duda is a corporation and Gressinger is a partnership. They conduct separate businesses and the fact that Gressinger may become a tenant of Duda at the latter's packing facilities does not in itself reduce it to the status of a subsidiary or affiliate of Duda. The new line would also serve Serralles and possibly another sugarcane producer located immediately south of Serralles, the Talisman Corporation, when the latter commences production. The record does not establish a corporate relationship between either of these sugar producers and Duda. If the extension were, in fact, merely a "private line," we would probably have no jurisdiction over the matter at all, since section 1(22) of the act exempts from our authority the construction of industrial lines located entirely within one State. There has been no contention that our jurisdiction herein is lacking on any ground.

Neither applicant suggests that the need for additional rail service is sufficient to warrant the construction of both

the proposed extensions, and, in fact, the record would not support an approval of both applications. Each is substantially dependent for its sustenance upon all the propsective traffic of Duda, Gressinger, and Serralles. East Coast, however, is neither ready for nor capable of its proposed undertaking. As detailed in the appendix it has not made meaningful studies of the specific terrain to be traversed. It has not obtained even a commitment for the right-of-way, nor has it investigated the possibilities for the acquisition thereof. Its proposal contemplates bridging waterways, crossing a highway, occupying a length of canal embankment, use of a private spur, and location on private land—all of which require authority beyond the province of this Commission to give, and which East Coast has made no effort to obtain from the appropriate authorities.

As to the financial capacity for the undertaking, East Coast, so far as is shown in this record, is sorely lacking. The carrier states an intention to finance the construction out of current funds said to be now available; yet, according to its most recent balance sheet of record, it has working capital hardly sufficient to meet current operating expenses. Current assets top current liabilities by about $2.14 million, an amount barely exceeding the monthly operating expenses (which average about $2.06 million, not including amounts needed for payment of the $677,500 long-term debt due within 1 year). This straitened circumstance is not made to look any less constricting by the fact that East Coast, only recently emerged from receivership, has suffered net deficits each year since 1958, ranging from $1.24 million to $4.79 million. Under the terms of its application, therefore, it does not appear that East Coast is in a position to carry out its proposal. Its circumstances today and its financial condition are not materially different from what they were in prior years when it refused to undertake the expense of constructing the southward extension requested by the shippers. As an

incidental consideration, it should be noted that this applicant's estimate of expenditures necessary for the construction, which in all probability is understated, is substantially in excess of the amount authorized for the project by East Coast's board of directors.

The argument is made that if Coast Line is permitted to build its proposed line, East Coast will be severely injured and the shippers dependent upon it—particularly those on the Fort-Pierce-Lake Harbor branch—will be substantially affected. Said to hang in the balance are the revenues from that branch which, according to East Coast, account for an estimated 50 percent of its net railway operating income. We do not believe that branch would be jeopardized by a grant to Coast Line.

At the outset, we are faced with a cost-revenue estimate with regard to the Fort Pierce-Lake Harbor branch, which is not adequately founded. The following extracts from the East Coast exhibit demonstrates [sic] its questionable quality:

	System	Branch	Contribution of branch to system	Total of branch and its contribution to system	System excluding branch and its contribution
Railway operating revenues	$28,745,649	$886,864	$1,601,387	$2,488,251	$26,257,398
Railway operating expense	$23,361,362	$1,252,519	$379,598	$1,632,117	$21,729,245
Operating ratio ..	81.3	141.2	23.7	65.6	82.8

What this purports to show is that while the traffic is moved on the branch, the cost of handling it exceeds the revenue from it by over 40 percent; but that as soon as the traffic leaves the branch and moves on some other part of the system, the cost of handling it is less than one-fourth of its revenues. Yet operations on both the entire system and that part of the system beyond the branch are conducted at a cost to revenue ratio exceeding 81. There is no satisfactory explanation in this record as to why this particular traffic can be handled beyond the branch at an

operating ratio of 23.7 while all other traffic on the system beyond the branch is handled at an operating ratio three times as high.

Based on the cost and revenue data in the above extract and on other pertinent data, East Coast shows that, of its total net railway operating income ($644,558), $303,071 is produced by the branch. The latter figure, as indicated above, lacks a proper foundation and cannot be accepted as an accurate measure of the net railway operating income generated by the branch. Nor can it be accepted as an indication of the economic injury to which East Coast would be susceptible as a result of a grant to Coast Line.

In the 1947 case, it was found that the few vegetable producers then in the new territory received adequate service by the trucking of their produce to Belle Glade for delivery to East Coast at that point. East Coast expresses concern at the prospect of this truck-delivered traffic being diverted to Coast Line (and in this, it is not consistent with its contention that the Coast Line construction involves only a "private line" not open to public use). However, the presence of Coast Line in the territory does not necessarily mean that East Coast would lose the truck-delivered traffic. As Coast Line points out, fresh vegetables, because they are perishable, cannot be left at the trackside for eventual loading on a train; they must be precooled or otherwise processed at facilities of the type at Belle Glade before loading. If they could be loaded at an ordinary team or side track, Coast Line would probably already be receiving a substantial part of the new territory's vegetable deliveries at the present terminus of its branch at Okeelanta, a point closer than Belle Glade to a number of the present producers; and East Coast would not occupy the dominant position it now has as to the vegetable traffic originating in the territory. In the event the Coast Line extension were put into operation,

East Coast, in all probability would continue to receive the traffic of the vegetable producers which do not have processing plants located on Coast Line's branch.

The record indicates that the land near Belle Glade which Duda and Gressinger will remove from vegetable production will be devoted to sugar. Although the evidence does not establish the amount of additional rail traffic which this increased sugar cultivation will produce, any such additional traffic will help to compensate East Coast for any loss of Duda's and Gressinger's vegetable traffic. Moreover increased production anticipated in the area east and southeast of Belle Glade will insure [sic] to East Coast's benefit. In our opinion, since East Coast will retain the vegetable traffic brought into Belle Glade for processing, and should obtain additional sugar and molasses traffic, the effects of Coast Line's construction upon East Coast's revenues will not be such as to impair East Coast's operations and service.

Coast Line is one of the Nation's major railroads. There is no evidence of record, nor any other indication, that the extension it proposes would weaken its system financial structure. This is not necessarily the case with East Coast, however. We are not prepared to find that East Coast's construction would place it in such a precarious financial position that the service which it renders to its shippers would be endangered. But it is obvious that East Coast would be likely to encounter financial difficulties in providing the facilities required by Duda, Gressinger, and Serralles.

Even if we were to grant East Coast's application, we are not satisfied that the line it proposes could be legally operated in the absence of a certificate of public convenience and necessity for the operation of the Co-op spur in interstate commerce. East Coast intends to use this spur as part of the line of railroad which it wishes to construct. However, the spur is owned by Co-op and there

is no indication in the record that its use by East Coast for other than the purpose for which it was intended would be agreeable to Co-op, and no application for a certificate authorizing its use has been filed by East Coast.

East Coast expresses apprehension that we will rely upon other deficiencies in its application as grounds for its denial. However, the application is sufficiently well developed to enable us to ascertain the nature of East Coast's proposal and to arrive at the findings of public convenience and necessity which we are required to make in the proceedings. Nevertheless, we feel that if East Coast were actually as interested as it claims to be in providing service to Duda and Gressinger, it would have utilized the 5-year period which it had prior to the filing of Coast Line's application to better advantage in the preparation of its application.

Contrary to a contention made by East Coast, the extension proposed by Coast Line would not unduly disturb the competitive situation in the affected area. To the extent Coast Line would acquire traffic from hitherto undeveloped territory, the position of East Coast would not be affected. To the extent territory formerly in vegetable production is converted to sugar, East Coast will gain some substitute traffic. And to the extent East Coast shippers increase their production of sugar and vegetables, East Coast will benefit.

Even if the effect on competition were substantial, which it is not in this case, it must be noted that competition for the sake of competition is not an objective of the regulatory policy. Competition is useful, where it has the effect of improving transportation service. Where retention of the status quo among competitors precludes the provision of needed service to shippers, competition becomes secondary.

In this instance, a grant to Coast Line will make possible the fulfillment of a demonstrated need for service

in a newly developed area, without causing undue erosion in the competive positions of any of the parties.

Southern's interest herein stems from the possible loss of approximately 5 percent of 229 cars (about 12 cars representing approximately $2,000 in annual revenue) of the traffic from the area of the proposed construction which it handles above Jacksonville. This 5 percent is that eastbound portion of the territory's traffic, which Southern now receives. The westbound portion, consisting of 95 percent of the territory traffic received by Southern for points beyond Jacksonville, should be retained by Southern, and the small amount of traffic which it may lose through Coast Line's construction is not sufficient to warrant the denial of Coast Line's application. The condition prescribed in *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, supra,* was found adequate by the hearing examiner, and we shall impose a similar condition upon our findings herein for the protection of Southern to provide that, with respect to all traffic originating on the line, the construction of which is herein found to be required, the Atlantic Coast Line Railroad Company is required to maintain, in connection with the Southern Railway System to and from the Jacksonville gateway, joint rates no higher than the rates applicable over the lines of the Atlantic Coast Line Railroad Company through that gateway.

In our opinion, the evidence of record herein requires approval of the application of Coast Line and the denial of that of East Coast.

We find that, subject to the foregoing gateway condition, the present and future public convenience and necessity (1) in Finance Docket No. 22696, require construction and operation by the Atlantic Coast Line Railroad Company of an extension of its Okeelanta branch line of railroad in Palm Beach County, Fla., as hereinbefore described, and (2) in Finance Docket No. 22777, do not require construc-

tion by the Florida East Coast Railway Company of a branch line of railroad in Palm Beach County, Fla.

An appropriate certificate and order will be entered, which, since the conclusions of the hearing examiner are not reversed, changed, or modified herein, will become effective 30 days from the date of its service.

COMMISSIONER WALRATH, concurring:

The difficulty with this case is that every objective fact demonstrated on the record seems to warrant the decision reached by the majority. I agree with my Brothers that there is no exclusive undeveloped area involved here, either as a matter of law or as the result of our earlier decision in 1947 cited by East Coast and adequately discussed by the majority.

What perturbs me is that economic circumstances prevented East Coast from cooperating fully with shippers' expressed desires during recent years, thereby forcing East Coast shippers to turn to Coast Line as the only alternative for the new service. This is unfortunate for the future of Florida's transportation system, because it may well, as East Coast fears, in time adversely affect the service on the Fort Pierce-Lake Harbor branch. Continued weakening of this carrier's financial position by reason of its inability to retain the traffic of present shippers and to obtain new traffic from newly developing territory is likely to have an every-widening [sic] detrimental impact upon shippers at the Florida points where there is no service but that of East Coast. To me, this effect is one that we should be anxious to avoid. However, the unfortunate chain of circumstances which prevented East Coast from seeking to extend its service prior to the Coast Line's filing, together with the uncertainties which, even in the event that the division were to grant its application, make it appear doubtful that the East Coast would be able within a reasonable time to overcome all the obstacles confronting

it, must be evaluated in the light of shippers' pressing requirements.

In the circumstances, considering the demonstrated needs of the shippers and Coast Line's ability based upon careful planning to meet these needs expeditiously, the weight of the evidence leads me to agree with the result favored by the majority. I must likewise agree with the majority that there is no need shown for granting both applications. I regret that there seems to be no feasible alternative in the public interest.

APPENDIX

Excerpts from report of hearing examiner

The Atlantic Coast Line Railroad Company * * * proposal is to extend Coast Line's present stub-end line serving the Okeelanta Sugar Mill eastwardly, crossing U. S. Highway No. 27 (State Road 25), a distance of approximately 6 miles, from which point a northern segment would extend about 2.5 miles and a southern branch about 4.4 miles. The northern terminus of the line is to serve a proposed new vegetable packinghouse and a precooling plant of A. Duda & Sons, Inc., hereinafter referred to as Duda, and the southern terminus is to serve the sugar mill of the South Florida Sugar Company, hereinafter sometimes called Serralles, now in operation. * * *

The proposed East Coast construction would spring from an existing spur line owned by the Sugar Cane Growers Cooperative, hereinafter called the Co-op, at a point about 1,500 feet short of the Co-op sugar mill, and would proceed south for a distance of 0.4 mile, thence east 1 mile, thence south 1.9 miles to the Hillsboro Canal where it would traverse the canal embankment in a southeasterly direction for a distance of 2.3 miles, then cross the canal and U. S. Highway 441 and proceed south for 10.3 miles, thence west 1.4 miles terminating at the sugar mill of Serralles. * * * The shippers requiring immediate rail service are Duda,

Gressinger & Sons, a partnership, and Serralles. The area south of Lake Okeechobee is located entirely in the Everglades. * * *

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Last season approximately 85,000 acres of vegetables were grown in the muck soil region of Palm Beach County. The carload equivalents of vegetables shipped from the lake region during the past 5 seasons has [sic] averaged 25,381 cars annually. Approximately 110,000 acres of sugarcane were harvested in the county last season. For the current season, it is estimated that 120,000 acres will be harvested. Five years ago, only 40,000 acres of sugarcane were planted in this area. It is estimated that during the coming planting season some 20,000 to 25,000 additional acres of cane will be planted. The whole area south of Lake Okeechobee has seen vast changes in the last 15 years. The sugarcane has displaced the vegetables from the warm land, pushing the vegetable farming further south.

Coast Line first entered the Everglades area in 1918 when it extended its line southward from Sebring to Moore Haven located on the western and southwestern shores of Lake Okeechobee. In 1921, the line was extended from Moore Haven to Clewiston, and in 1928 from Clewiston to Lake Harbor on the southern shore of Lake Okeechobee. *Atlantic Coast Line R. Co. Construction,* 145 I.C.C. 326. Then in 1947, Coast Line built its Okeelanta branch which terminates approximately 2.5 miles west of U. S. Highway No. 27. *Atlantic Coast Line R. Co. Construction,* 267 I.C.C. 803, Finance Docket No. 15335, decided August 25, 1947 (not printed in full). In the same report and order a similar application on behalf of East Coast to construct into the area was denied. 267 I.C.C. 806.

Construction of the Coast Line extension has been under consideration for the past 5 or 6 years. The proposal did not, however, get beyond the talking stage until about a year ago when Duda was faced with the necessity of mak-

ing a rather radical change from the facilities being utilized at Belle Glade, and concluded to build a processing plant at the northern terminus of the proposed line of Coast Line. Duda approached Coast Line and asked Coast Line to obtain the necessary authority to construct and operate a line of railroad to its property. About that time, Serralles began the production of sugarcane in Florida and requested Coast Line to extend its line to serve the sugar mill of South Florida Sugar Company, now in operation at the southern terminus of the proposed line.

The right-of-way selected by Coast Line is uniformly level and flat. It will be 150 feet in width, and the track will be placed 50 feet from the right-of-way line in order to allow 100 feet for excavation of borrow pit for the roadbed section. * * * The total construction cost of the line, including sidetracks, is estimated by Coast Line at $1,012,165, and completion of the project will require about 12 months. The estimated maintenance cost for the first year of operation is $24,080 which will decrease each year to the fifth year when it will be $19,350, and then remain constant for many years. This estimate is based on Coast Line's actual experience in maintaining the present Okeelanta branch.

Coast Line estimates that operations over its proposed extension in the first season after construction would develop 3,432 carloads of freight and $849,332 in total revenues. Of these totals, 2,586 of the estimated cars and $674,081 of the estimated revenues are to come from shipments of fresh vegetables by Duda and Gressinger; 341 of the estimated cars and $102,219 of the estimated revenues are to come from shipments of raw sugar and molasses by Serralles; and the remainder of the estimated cars and revenues is to come from inbound shipments of fertilizer, crate materials, and insecticides to Duda. In the fifth season of operation over the proposed extension, Coast Line estimates a total of some 4,191 cars and $1,036,248 of rev-

enues, made up 3,161 of the cars and $823,468 of the revenues from shipments of fresh vegetables by Duda and Gressinger; 415 of the cars and $124,453 of revenue from shipments of raw sugar and molasses by Serralles; the remainder of estimated cars and revenues represent inbound shipments to Duda of crate materials, fertilizer and insecticides.

* * * Expenses on the line are estimated to be $41,396 during the first year, decreasing slightly each year thereafter until the fifth year when they would total $38,104. The net railway operating income for the first year of operation is estimated by the Coast Line at $131,393 and increases steadily until the fifth year when it becomes $173,667. This would amount to a rate of return of approximately 17 percent on the initial investment of $1,012,165, which would be recouped after interest at 6 percent in a period of approximately 8.5 years.

On Coast Line's present Okeelanta branch, the normal shipping season extends from October to March of each year. This line was built primarily for the movement of sugarcane products. During the season, Coast Line normally operates a train from Clewiston or Palmdale to Okeelanta and return 6 days each week. During the remainder of the year, train service over the Okeelanta branch is provided when necessary by a local freight which operates from Lakeland to Lake Harbor.

If and when the Okeelanta line is extended, the vegetable season would extend from approximately December 1 through May 31 of each season. Coast Line will operate a daily turnaround local freight train from Clewiston or Palmdale over the Okeelanta branch from about October through May of each season, or about 2 months longer than is presently being done. During the remainder of the year, the Okeelanta branch will be served by operating the Lakeland-Lake Harbor local over the branch when there is traffic to be handled. The proposed extension will not require any increase in the number of locomotives required

to handle traffic on Coast Line's Tampa division. Switch engine service will not be required since all switching service of the Okeelanta branch will be performed by the road traincrew regardless of whether it is a turnaround local or the Lakeland-Lake Harbor local. Switching for Duda, Gressinger, and Serralles will be performed by road crews with road engines. The road crew is paid for a basic day of 8 hours, or 100 miles. A turnaround train operating from Clewiston to the end of the Okeelanta branch and return will be less than 100 miles. Clewiston would be the governing agency, and the clerical work for the newly established stations would be performed from the Clewiston agency with the existing force assignment.

* * * * * * * * * * *

East Coast first extended its railroad into the Lake Okeechobee region in 1915. In *Florida East Coast Ry. Co. Construction,* 76 I.C.C. 433, Finance Docket No. 2561, decided January 10, 1923, East Coast was given authority to extend its line through Belle Glade on to Miami. The line was constructed to Belle Glade in 1927. In 1934, after several extensions for completion of the construction, this Commission canceled the unexercised authority granted in Finance Docket No. 2561. In *Florida East Coast Ry. Co. Construction,* 145 I.C.C. 369 (1928), additional authority was granted to build a line from Belle Glade to a connection with the Coast Line at Lake Harbor. East Coast's application to extend its line to serve the sugar mill of the Okeelanta Growers and Producers Cooperative, Finance Docket No. 15444, was denied in 267 I.C.C. 806.

East Coast proposes a right-of-way 60 feet wide which it expects to purchase for $95,000. No contact has been made with the property owners toward the acquisition of such right-of-way. The right-of-way cost was arrived at after conferences between the engineering and real estate departments of East Coast. There is nothing in the engineering estimate to cover the cost of the Co-op track, nor

have any commitments been secured by East Coast covering its use. The engineering reconnaissance of East Coast was made on October 16, 1963, more than a month after its application herein was filed.

* * * The engineering survey was made by riding over the area in an automobile except the last mile which was not gone over at all. A number of farm crossings will be required, but no estimate was made as to how many or their locations, although it was felt by the engineering witness that the grading cost would adequately cover construction of them. No effort was made to include the maintenance-of-way costs on the line following its construction. The line will cross three canals, with two having 29-foot removable center spans. It will also have six curves, all of which will be approximately 10 degrees.

East Coast estimates that construction of the line it proposes would cost $2,140,000, plus $55,000 for a sidetrack, making a total of $2,195,000 for the entire construction cost. To the latter amount should be added $1,677 for the tie plates, $8,286 for relay rail, and $8,000 for a third protective highway crossing signal, which were inadvertently or erroneously omitted from the engineering estimate. This would increase the total cost of the construction proposed by East Coast to $2,212,963, and would not include any amount which would have to be paid by East Coast for the use or purpose [sic] of the Co-op spur, described more fully hereafter. The resolution of East Coast's board of directors authorizing the construction limited the cost thereof to an expenditure not to exceed $2 million. It is estimated that the East Coast construction would be completed in about 12 months.

East Coast estimates that operations over its proposed extension in the first year after construction would develop 61,864 tons of carload freight traffic and $273,541 in revenues as follows: 11,252 tons (625 cars at 18 tons per car) and $81,464 in revenue would come from increased produc-

tion and shipments by Duda, not now handled by East Coast; 36,600 tons (732 cars at 50 tons per car) and $134,322 of the revenues would come from raw sugar shipped by Serralles, Florida Sugar Corporation, and Atlantic Sugar Association; 10,970 tons (210 cars at 50 tons per car) and $41,556 in revenues would come from molasses shipped by the sugar producers; and the remainder represents estimated shipments of inbound fertilizer, insecticides, and crate materials. East Coast estimates the proposed extension in the fifth year would develop 118,309 tons of carload freight traffic and $523,212 in revenues made up of the following: 21,567 tons (1,253 cars at 18 tons per car) and $156,152 in revenues would come from increased production and shipments by Duda; 70,000 tons (1,400 cars at 50 tons per car) and $256,000 from shipments of raw sugar, 20,860 tons (417 cars at 50 tons per car) and $79,477 from shipments of molasses; and the remainder from inbound shipments of materials and supplies.

In its estimates East Coast included shipments by Duda only to the extent that they represented an increase over those now handled, and do not include the 1,966 cars or $203,327 in revenues received in each of the three seasons 1959-60 through 1961-62 by East Coast from Duda shipments of fresh vegetables at Belle Glade. East Coast maintains, however, that the construction of its extension is essential to prevent diversion of this traffic to Coast Line, or, in part, to truck transport.

In its data reflecting the estimated financial results of operation on the extension, East Coast applied 50 percent of its freight operating ratio of 66.4 percent for 1962 to determine the out-of-pocket cost of handling the traffic to and from the extension on other parts of its system. Historically, such costs have been assigned on the basis of 50 percent of the revenues earned from handling the traffic on system lines after first deducting a mileage prorate assignment made to the line direct. Thus the East Coast

formula for determining the cost of moving the traffic to and from the extension from and to connections at Jacksonville would materially underestimate the expense entailed by such movements.

Coast Line questions the right of East Coast to use existing trackage serving the Co-op mill as the starting point for its proposed extension. * * * The East Coast contends that * * * East Coast reserved the right to use the track to the Co-op mill to serve others, and that its application in this proceeding clearly covers the proposed extension by reference to extension of its existing trackage serving the mill.

Construction of the track to the Co-op mill was completed November 1, 1962. It was built as a spur or industrial track to serve a single shipper, and as such was exempt from the certificate provisions of section 1 by paragraph 22 thereof. Under these circumstances, the track cannot be considered a part of East Coast's railroad system, and even if East Coast, as it contends, had the right to spring its proposed extension from this track, a certificate of public convenience and necessity permitting train service over the spur, or any portion thereof, between the East Coast main line and the point where construction of the extension is to begin, is prerequisite before any operations in interstate or foreign commerce are lawful. Compare *Illinois Central R. Co. Construction and Operation,* 217 I.C.C. 615. (1936).

A member of the Co-op testified that the Co-op paid $168,000 for the 1.6 miles of track serving its mill. Of this amount $50,000 has been paid, and the balance, represented by promissory notes, is payable in installments over the next several years. The record indicates that East Coast does not carry the spur track to the Co-op mill in its account, or includes it in the reports to this Commission, nor does it pay taxes on the track in question.

* * * There is no legal instrument in evidence which gives the East Coast a right to use the Co-op track in connection with operating the proposed extension. Apparently East Coast relies only on a standard sidetrack agreement for such authority.

Duda, although one corporation, is engaged in several endeavors. One is the production of vegetables, including celery, sweet corn, cabbage, potatoes, and salad greens. The company also is engaged in the production and marketing of cattle and the production of citrus. Its principle vegetable production is at Belle Glade. Out of a total of 3¾ million packages per year, Duda's Belle Glade farms account for about 2½ million packages. Presently, in a 6-county area, Duda has about 2,150 acres producing citrus with 5,000 acres scheduled for development. Sugarcane production is another important phase of the Duda operation. Presently, in the Belle Glade area, Duda has 2,700 acres of sugarcane with another 1,000 acres scheduled for planting by the spring of 1964. Duda's cattle operation is a 43,000-acre ranch in Brevard County, and a recently acquired 25,000 acres in the LaBelle-Immokakee area. Part of this latter acreage will, however, be devoted to citrus production with the remainder being devoted to beef production.

Duda owns or controls approximately 25 square miles of land in the territory tributary to the proposed construction. Several months ago, Duda employed a consultant specialized in the food processing industry to prepare a feasibility report on building a plant at the Duda farm, incorporating a number of innovations in field handling, processing, precooling, and loading of fresh vegetables. A favorable report, with preliminary layout sketches and cost estimates has been received from the consultant with the finding that such plans are feasible, economically sound, and desirable.

Even before the disastrous fire in December 1963, the facilities utilized by Duda in Belle Glade to process, pack, and precool vegetables were totally inadequate for an operation of its size. * * *

About 5 years ago, Duda asked the East Coast to build a line to serve its farm. * * * A delegation of East Coast representatives called on Duda and informed Duda that the East Coast would build the railroad, but at Duda's expense. After waiting several years, Duda turned to Coast Line and asked it to build the proposed line. No further contact was made with Duda by an East Coast representative concerning the construction of a line of railroad to the Duda property until after the Coast Line application herein was filed.

Duda concluded there isn't enough room available in Belle Glade to build a facility the size Duda needs. Additionally, Duda wants to get away from the truck and rail congestion that exists in Belle Glade, and more important, a packinghouse located on the farm will shorten the truck haul from the fields, thereby providing an economy in operation, as well as eliminating unnecessary handling of produce, which not only wastes labor and sacrifices freshness of the produce, but lowers the quality and customer acceptance. Duda chose the northern terminus of the proposed line of Coast Line as its plant location because it is at the center of the western boundary of the Duda vegetable producing property. If the East Coast is authorized to construct the line, the plant will be located in the eastern part of Duda's holdings.

* * * * * * * * * * *

Another very practical consideration for Duda moving out of Belle Glade is that its vegetable production is moving south as it is being displaced north of Bolles Canal by increased sugarcane plantings. * * * At the beginning of the East Coast strike, the vegetable production from the area south of Bolles was loaded on Coast Line at either

Lake Harbor or Clewiston. By the spring of 1964, Duda will have about 1,100 acres of cane planted south of Bolles which also will be processed by the Co-op mill and handled by the East Coast in the same manner as the cane produced north of Bolles.

It is Duda's decision to build the new facility at the proposed location irrespective of rail service. In the event, either applicant is not permitted to build a line to serve the new facility, Duda will market as much as possible by truck. Duda would also investigate the possibility of hauling the produce that had to go by rail to railroad sidings other than Belle Glade, perhaps utilizing piggyback service, loading at Okeelanta.

Gressinger grows and ships fresh produce out of the Belle Glade area. It started its Belle Glade operation 13 years ago with 30 acres. The produce grown by Gressinger consists primarily of lettuce, cabbage, corn, and radishes. Its Florida operation expanded very rapidly from the outset and now comprises about 3,000 acres in an area of approximately 4½ square miles.

* * * * * * * * * * *

Gressinger proposes to move its operation to the site of the northern terminus of the proposed Coast Line extension. Duda approached Gressinger about a year and a half ago offering Gressinger the use of the new Duda facilities or Gressinger could construct its own packinghouse on the Duda property at this point. Gressinger and Duda have a close working relationship, their sales organizations cooperated and work together, and the two concerns frequently interchange produce. Gressinger supported the Coast Line application and stated that without the proposed rail service its operation would be definitely handicapped.

During the 1961-62 season, Gressinger shipped 274 rail cars out of a total production of 2,500 carlot equivalents. The remainder went by truck. In the 1960-61 season,

Gressinger shipped 152 rail cars out of a total production of approximately 2,250 carlot equivalents. The remainder went by truck. Coast Line estimates that Gressinger, if moved to a new facility on the proposed Coast Line extension, would ship 420 rail cars out of a total production of more than 3,000 carlot equivalents.

Cultivation of sugarcane in the Lake Okeechobee area has been stimulated by the termination of United States imports of sugar from Cuba. Planting quotas recently have been removed. The production of the Serralles sugar mill was small in the 1962-63 season because adverse weather conditions damaged the sugarcane crop.

For the 1963-64 season, Serralles will have 5,000 acres planted in sugarcane, and in the 1964-65 season, it anticipates a sugarcane planting of approximately 7,000 acres, or just about the grinding capacity of its new mill. It is estimated that 264 cars of sugar and 77 cars of molasses will be produced from the 5,000 acres, with proportionate increases as the acreage planted in cane increases.

Serralles asked Coast Line to file its application to build the line to the new mill. The line is essential to the transportation needs of Serralles, and will save money and enable a more efficient and economical method of marketing sugar products, as well as be of use for the receipt of inbound commodities. Prior to contacting Coast Line, Serralles, on several occasions, talked to East Coast representatives about building the proposed line. Serralles was advised that if a railroad was built Serralles would have to pay for it because the East Coast did not have money to build it. It was after this refusal that Serralles requested Coast Line to build the proposed line.

* * * * * * * * * * *

Southern's only interest in these proceedings stems from the fact that it presently has effective through routes and joint rates on vegetable traffic originating on the East

Coast in the Lake Okeechobee area and interchanged with the Southern at Jacksonville for destinations through the Potomac Yard, Va., gateway to points in Eastern United States and Canada, but has no representation in routes and rates on such Florida traffic originating on the Coast Line. In *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line,* 320 I.C.C. 122, Finance Docket No. 21215, decided December 2, 1963, the Commission, in approving the merger of the Seaboard Air Line and Coast Line, imposed a condition requiring that the Jacksonville gateway be opened to Southern on all Florida traffic on a reciprocal basis. In view of that decision, Southern's concern in the instant proceedings is no longer a valid issue.

East Coast provides rail service from both South Bay and Belle Glade, for vegetables and sugarcane products grown in the Lake Okeechobee area, over its Fort Pierce-Lake Harbor branch. Growers of vegetables in the area have trucked their produce to packinghouses and precooling and loading facilities located on the line of East Coast at Belle Glade and South Bay for many years. During each of the 9 growing and shipping seasons beginning 1953-54 and ending 1961-62, East Coast has handled outbound an average of 11,279 cars of fresh vegetables from Belle Glade. Of the total, Duda's shipments averaged 15.2 percent. Raw sugar and molasses produced at sugar mills in the area has [sic] also been trucked to the East Coast at Belle Glade.

Products of agriculture accounted for 37.6 percent of the cars, 25.6 percent of the tons, and 23.8 percent of the revenues of total carload freight traffic of East Coast in 1961, the most recent year for which East Coast has complete data. This category embraces both fresh vegetables and citrus fruit, the vegetable portion producing gross revenues of $2,756,951. Products of agriculture represent the only significant group of commodities originated on the lines of East Coast for northbound movement to connec-

tions at Jacksonville. Of the 1961 total East Coast Revenues [sic] from products of agriculture, 40 percent were obtained from shipments originated on the Fort Pierce-Lake Harbor branch.

Records of East Coast show that Duda shipped from Belle Glade an average of 1,966 cars of fresh vegetables, which produced $293,327 in revenues for East Coast, in each of the three seasons, 1959-60, and 1961-62. Gressinger shipped 274 cars of fresh vegetables from Belle Glade, producing approximately $40,880 in revenues for East Coast, during the 1961-62 season. This data does not include revenues presently received by East Coast from inbound shipments to Duda and Gressinger of crate materials, fertilizer, and insecticides. East Coast estimated that in 1961 it handled 441 cars of this traffic, producing $39,928 in revenues, for Duda.

East Coast would provide service over its proposed extension as a part of the service performed over the Fort Pierce-Lake Harbor branch. During the heavy vegetable shipping and sugarcane grinding season, East Coast operates three cane trains daily and two turnaround freight trains between Fort Pierce and the Belle Glade-South Bay-Canal Point area. The engines on the cane trains and on the freight trains are used for switching loaded and empty cars at Belle Glade and South Bay. The cane trains require approximately 2½ hours for each round trip from the field to the sugar mill. When the volume of traffic requires, East Coast also operates a Belle Glade switch engine to accumulate cars and to spot loaded and empty cars. East Coast proposes to handle inbound traffic to points on the proposed extension on one, generally the first, of the two daily turnaround freight trains. Loaded cars will be picked up by the second turnaround freight, the Belle Glade switch engine, or other engines, depending upon the amount of work in the area. East Coast would move the loaded cars to Fort Pierce, where connection

would be made with East Coast northbound trains for Jacksonville for delivery to connections beyond.

The Fort Pierce-Lake Harbor branch represents an investment of $5,820,712. Operations on the branch in 1961 totaled 50,786 cars of revenue freight, producing gross revenues of $2,488,251.

* * * * * * * * * * *

East Coast contends that any diversion of traffic to Coast Lines [sic], and consequent reduction and impairment of East Coast traffic, would seriously affect shippers relying upon East Coast service over the Fort Pierce-Lake Harbor branch to meet their transportation needs. A number of shippers from Belle Glade and the Pahokee-Canal Point area testified that the rail service of East Coast is reasonably satisfactory and that any loss or impairment of that service would adversely affect their operations. None of these shippers expressed any intention of locating facilities on the line proposed by East Coast. Their only concern is the continued service provided by East Coast at Belle Glade. No evidence of record indicates that such service by East Coast over its Fort Pierce-Lake Harbor branch would substantially deteriorate or be curtailed to any great extent by approval of the Coast Line application.

* * * * * * * * * * *

The line proposed by East Coast would reduce the truck haul from sugar and molasses produced by Atlantic Sugar Association. This group would be able to load at the point the proposed East Coast line crosses State Highway 80 east of Belle Glade. The line proposed by East Coast is located so that, if direct rail service to the sugar mill of Atlantic Sugar Association or any future vegetable processing and precooling facility at Gladeview is required, it could be constructed with a relatively short additional extension of the East Coast proposed line.

Florida Sugar Corporation grows sugarcane on approximately 6,800 acres in the area south and east of Belle

Glade. The company anticipates that 8,000 acres will be in production in the 1964-65 season. The company operates a sugar mill located on Highway 80, approximately 11 miles east of Belle Glade. The mill began operations in the 1961-62 season, and has the capacity to grind 3,000 tons of cane per day. During the 1962-63 season, the mill produced 20,774 tons of raw sugar and about 1,300,000 gallons of molasses. The present production of the mill is trucked to Belle Glade for shipment on the East Coast. The extention proposed by East Coast would reduce the distance from the mill to the railhead from more than 11 miles to approximately 6 miles to team tracks to be constructed at the point where East Coast proposes to cross U. S. Highway 441 (State Highway 80). There are no plans to construct a line of railroad to the Florida Sugar Corporation mill.

The Osceola Operating Corporation owns a 30,000-acre tract east of the Serralles properties. Operations on this property are conducted by Big B Ranch, a division of Osceola. The land is in the initial state of development; canals, ditches, pumping stations, roads, et cetera are being constructed. By the 1964-65 season, 20,000 acres are expected to be developed for sugarcane, with the remainder in pasture for cattle. The company plans to erect a sugar mill with a capacity of 5,000 tons a day or 500,000 tons of raw sugar per season of 100 days, in addition to molasses. Big B Ranch supports the construction of a railroad into its area, but it is indifferent as to which applicant herein prevails. The line proposed by East Coast is closer than that proposed by Coast Line, and East Coast contends that it could with less difficulty and expense extend a line of railroad to any future mill site of Big B Ranch when sufficient traffic developed to justify such an extension.

The record shows that Coast Line is not approaching any closer to East Coast by its proposed construction than it is now from Okeelanta. Duda and Gressinger are de-

termined to move out of Belle Glade. Duda has shifted its vegetable farming south of Bolles Canal. This is new vegetable producing territory for Duda, and East Coast has no inherent or vested right to follow the vegetable traffic formerly produced north of the canal and handled by it at Belle Glade. Under these circumstances, it cannot be said that the extension proposed by Coast Line will invade East Coast territory. But even if such were the case, the Commission and the courts repeatedly have held that a carrier has no legal right to the exclusive occupancy of a territory. *Gulf, M. & O. R. Co. Construction,* 271 I.C.C. 541, and the cases therein cited.

These proceedings are repetitious of the earlier struggle between the applicants to extend their respective lines to serve the sugar mill at Okeelanta decided in *Atlantic Coast Line R. Co. Construction, supra.* East Coast relies on the Commission's decision in those cases to support its claim of exclusive right to serve the new facilities of Duda and Serralles. The instant record indicates, however, that changed conditions with respect to the relocation of vegetable plantings, the truck haul to the railhead, and the general chaotic situation existing at Belle Glade, no longer support the contentions now advocated by East Coast. Such conclusion is also warranted with respect to certain correspondence of record interchange between the president of Coast Line and the trustees of East Coast during May and June, 1958, concerning the tributary territory here involved.

In view of its current financial position, as evidenced by its most recent general balance sheet and the income statements of record, it would appear that an expenditure by East Coast of more than $2 million for its proposed extension would result in a serious strain on its available resources. However, aside from such consideration, the shipper support offered on behalf of the Coast Line application is more direct, substantial, and persuasive than that

presented for and on behalf of the East Coast proposal. The shippers supporting Coast Line left no doubt of the immediate and urgent need of the Okeelanta extension to their respective businesses. The facilities in Belle Glade are inadequate and unsatisfactory in all respects to handle their rail transportation needs. So much so that Duda is willing to spend more than a million dollars to correct the situation. Dependable railroad service is essential for the orderly marketing of the products of these witnesses.

East Coast manifested no interest whatever in constructing an extension south of Belle Glade until after the application of Coast Line herein was filed. Although repeatedly requested to do so during the past several years, East Coast ignored the solicitations of Duda, Gressinger, and Serralles to extend its line in a manner to provide needed rail service at their respective operation and plant sites. When it became obvious that such service would not be furnished, the principal shippers herein appealed to the Coast Line to extend its Okeelanta branch line into the area. Heretofore the Commission has held that the interest of shippers directly involved are matters of substantial importance in determining the question of public convenience and necessity. *Chesapeake & O. Ry. Co. Construction,* 267 I.C.C. 665, 681, and *Gulf, M. & O. R. Co. Construction, supra.*

The extension proposed by Coast Line is considerably shorter and less expensive to construct. Coast Line's return to questionnaire and the evidence it presented at the hearing are complete and cover every detail relating to traffic, engineering, operation, and cost, and its construction could be commenced immediately upon the issuance of the certificate here sought. Because of the thoroughness with which all preliminaries were considered and presented, Coast Line could place its extension in operation at the earliest possible date in accordance with the desires of the shippers to be served. Such result would be par-

ticularly gratifying to Duda because of the recent fire at Belle Glade.

On the other hand, considerable preliminary work must be done before the East Coast would be in a position to proceed with its proposed construction. As mentioned above, a certificate must be applied for and issued permitting operations in interstate and foreign commerce over the portion of the Co-op spur which East Coast intends to use to reach the line proposed to be constructed. East Coast anticipates no difficulty in obtaining necessary right-of-way for its construction, but it has not contacted any of the property owners involved. East Coast also assumes the use of the embankment along the Hillsboro Canal for right-of-way purposes, but the Flood Control District has not been approached. No evidence was offered by East Coast to indicate that any one of the several property owners would willingly permit the proposed railroad to cross their land, and no evidence was offered to show that necessary canal and highway crossing permits had been applied for, or if issued, would waive certain minimum clearance provisions.

Ultimate Findings, Certificate, and Order

The examiner finds that the present and future public convenience and necessity (1) permit construction by the Atlantic Coast Line Railroad Company of an extension to its Okeelanta branch line of railroad in Palm Beach County, Fla., as hereinabove described, Finance Docket No. 22696, and (2) are not shown to require construction by the Florida East Coast Railway Company of a branch line of railroad described above in Palm Beach County, Fla., Finance Docket No. 22777.

* * * * * * * * * *

APPENDIX C

Service Date
April 22, 1965

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D. C., on the 21st day of April, A.D. 1965.

Finance Docket No. 22696

ATLANTIC COAST LINE RAILROAD COMPANY CONSTRUCTION

Finance Docket No. 22777

FLORIDA EAST COAST RAILWAY COMPANY CONSTRUCTION

Upon consideration of the record in the above-entitled proceedings, including the petition filed April 12, 1965, of the Florida East Coast Railway Company (East Coast) seeking reopening, further hearing, and reconsideration of the report, certificate and order of the Commission, Division 3, served December 31, 1964, as supplemented by a copy of an affidavit of William D. Pawley, filed April 13, 1965, the original of which was submitted to the United States District Court for the Middle District of Florida in the pending matter of Florida East Coast Railway Company v. United States, No. 65-12-Civil-J; and the reply thereto, filed April 16, 1965, by the Atlantic Coast Line Railroad Company (Coast Line); and

It appearing, That the petition, which is based upon the possible elimination of the South Florida Sugar Company, Inc., a shipper which was to receive service from Coast Line under the authority granted by the certificate and order served December 31, 1964, Finance Docket No. 22696, does not show good cause warranting a result different from that reached by the above certificate and order; that even with the elimination of such shipper, the public con-

venience and necessity require a rail extension since Coast Line's proposed extension will reach two shippers which require rail service; that the area in question is being developed and rail service is necessary for future requirements as well as to meet the immediate present needs of the two shippers involved; that, after the fifth year of operation, Coast Line expects to realize gross revenues of over $1 million from all shippers, of which only $124,453 was to accrue from traffic to and from the sugar mill; that the certificate and order served December 31, 1964, being permissive and issued in contemplation of the future as well as the present requirements of the public convenience and necessity, there is no requirement that the portion of Coast Line's proposed extension to the sugar mill be constructed at this time, lacking an immediate need therefor; and that the loss of the sugar mill does not affect the construction or operation proposed by Coast Line to require a modification of the certificate and order served December 31, 1964;

It further appearing, That nothing in said petition offsets East Coast's inability to go forward within a reasonable time with its proposed construction as found in the report served December 31, 1964; that after the fifth year of operation East Coast expected to realize $523,212 in gross revenues from all shippers, of which $335,477 would accrue from traffic to and from the sugar mill; that the bulk of the latter traffic would be lost to East Coast if the sugar mill ceases operation so that East Coast would suffer more in revenue loss than would Coast Line; and that despite the possible reduced cost of constructing the line proposed by East Coast in Finance Docket No. 22777 such fact alone still does not warrant a result different than that reached in the report served December 31, 1964; that no new facts have been alleged which, if proven true, would warrant a result other than that contained in the decision served December 31, 1964; and

It further appearing, That no useful purpose would be served by reopening these proceedings for further hearing to consider the effect of the matters alleged in East Coast's petition;

It is ordered, That the petition be, and it is hereby, denied.

By the Commission, Division 3, acting as an Appellate Division.

BERTHA F. ARMES,
Acting Secretary.

(SEAL)

APPENDIX D

§ 1, par. (18). Extension or abandonment of lines; certificate required; contracts for joint use of spurs, switches, etc. No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 of this title shall be considered to prohibit the making of contracts betweeen carriers by railroad subject to this chapter, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

§ 1, par. (19). Application for certificate of Commission; notice and hearing. The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this chapter shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned,

with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

§ 1, par. (20). Issuance of certificate by Commission; unlawful extension or abandonment of lines. The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

Office-Supreme Court, U.S.
FILED
OCT 4 1965
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 541

FLORIDA EAST COAST RAILWAY COMPANY,

Appellant,

v.

UNITED STATES of AMERICA, INTERSTATE COMMERCE COMMISSION, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA.

MOTION TO AFFIRM

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Intervenor-Appellee

October, 1965

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MOTION TO AFFIRM

Atlantic Coast Line Railroad Company, intervenor-appellee, pursuant to Paragraph 1(c) of Rule 16 of the Rules of the Supreme Court of the United States, moves that the final judgment and decree of the District Court be affirmed.

This is a direct appeal from a final judgment entered May 19, 1965, by a District Court of three judges specially constituted pursuant to 28 U.S.C., Sections 1336, 1398, 2284 and

2321-2325, inclusive, dismissing an action brought by Florida East Coast Railway in the District Court of the United States for the Middle District of Florida, to enjoin, annul and set aside the enforcement of the order of the Interstate Commerce Commission, dated December 18, 1964, issued in ICC Finance Docket No. 22696, *Atlantic Coast Line Railroad Company, Et Al. Construction*, reported at 324 I.C.C. 286 (1964). The decision of the three-Judge Court was *per curiam*, reported as *Florida East Coast Railway Company* v. *United States*, 242 F.Supp. 490 (1965).

In support of its motion to affirm, Appellee Coast Line adopts as grounds for its motion those advanced in the motion filed, or to be filed, by the Interstate Commerce Commission, and in addition, it urges the grounds hereinafter set forth.

QUESTION PRESENTED

The only question presented by the appeal, as set forth in the Jurisdictional Statement, is as follows:

> May the Commission, under section 1(18) of the Interstate Commerce Act, authorize a railroad to construct an extended line of railroad to meet the desires of a single shipper when the public will be permitted to use the new line only with the consent of that shipper?[1/]

STATEMENT

Coast Line, on July 10, 1963, filed application with the Interstate Commerce Commission pursuant to Section 1(18) of

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1/Two additional questions were stated in the Notice of Appeal, but abandoned by appellant in the Jurisdictional Statement. Only the one question above stated is before the Court.

the Interstate Commerce Act,[2/] an application for a certificate of public convenience and necessity to construct a branch line of railroad in Palm Beach County, Florida, to serve the vegetable and sugar interest developing in a new territory several miles south of Belle Glade, Florida. The Florida East Coast, after refusing for years to meet the needs of the shippers in this new territory, filed on Septembr 13, 1963, its application for authority to construct a line of railroad to serve the same general area.

The full administrative process was employed by the Interstate Commerce Commission, including oral argument, and the Commission found that the evidence required that a certificate of public convenience and necessity be issued to Coast Line and denied Florida East Coast.

In considering the alleged invasion of territory argument, the Commission found that the "new vegetable producing territory" in the area of the proposed construction was not the "exclusive preserve" of Florida East Coast; that the Commission had not previously designated this area as Florida East Coast territory; and that a carrier "does not have the right to exclusively occupy a territory."[3/] In weighing the evidence, the Commission found that shippers had not been successful in getting Florida East Coast to offer this new territory rail service, and that it "stood unmoved by the beckoning of the new territory and the importunities of the shippers" until after Coast Line sought to build a track into this new territory.[4/] The Commission noted how Florida East Coast had vacillated -- first acknowledging the need for rail service to this

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2/49 U.S.C. §1(18).

3/*Atlantic Coast Line Railroad Company, Et Al. Construction*, 324 I.C.C. 286, 290 (1964).

4/*Id.* p. 290.

new territory, then on exceptions expressing skepticism as to public need for rail service -- but later at oral argument positively acknowledging that this territory required rail service -- but only by Florida East Coast.[5/]

In further weighing the evidence, the Commission found Florida East Coast had not made meaningful studies of the specific terrain; that it had made no provisions for right of way; and that it had made no provisions for bridging waterways, highways and canal embankments, as well as contemplated use of a private rail spur to reach the beginning point of its proposed construction.[6/] The Commission also found the record showed that the financial capacity of Florida East Coast "is sorely lacking", and that the expenditure proposed "is substantially in excess of the amount authorized for the project by East Coast's board of directors.[7/]

The Commission further found that the evidence showed "the effects of Coast Line's construction upon East Coast's revenues will not be such as to impair East Coast's operations and service,"[8/] and that there was no substance to Florida East Coast's contention that Coast Line's construction would unduly disturb the competitive situation in the affected area.[9/] The weight of the evidence was summed up very appropriately in a special concurring opinion by one Commissioner:

5/*Atlantic Coast Line Railroad Company, Et Al. Construction*, 324 I.C.C. 286, 291 (1964). In the Reply Brief filed by Florida East Coast before the three-Judge Court, it reverted to the argument that the record demonstrates no public need for rail service in this territory.

6/*Id.* p. 292.

7/*Id.* p. 292-293, 295.

8/*Id.* p. 294.

9/*Id.* p. 295.

> "In the circumstances, considering the demonstrated needs of the shippers and Coast Line's ability based upon careful planning to meet these needs expeditiously, the *weight* of the evidence leads me to agree with the result favored by the majority . . . . I regret that there seems to be no feasible alternative in the public interest." (Emphasis supplied)[10/]

The Commission further held the evidence showed "East Coast manifested no interest whatsoever in constructing an extension south of Belle Glade until after the application of Coast Line was filed"; that East Coast "ignored the solicitations" of shippers to extend its line; that Coast Line's extension "is considerably shorter and less expensive to construct"; and that the evidence Coast Line presented at the hearing is "complete and cover[s] every detail relating to traffic, engineering, operation, and cost and its [Coast Line's] construction could be commenced immediately upon issuance of the certificate . . . sought." This, the Commission said, would enable "Coast Line to place its extension in operation at the earliest possible date in accordance with the desires of the shippers to be served."[11/]

10/*Atlantic Coast Line Railroad Company, Et Al. Construction*, 324 I.C.C. 286, 297 (1964).

11/*Id.* p. 307. The record shows the principal shippers' (Duda) facilities were destroyed by fire, and following the Commission's report granting Coast Line the certificate, Duda commenced construction of a new packinghouse facility at a site to be served by the Coast Line's extension. Florida East Coast proposed to serve Duda at a different site approximately four miles away. Duda's new near $2 million facility is scheduled to be in operation when the next vegetable season opens in November 1965, and Coast Line's track is scheduled to be in place and ready to serve this industry by the opening date. Construction by Coast Line of the extension commenced on May 20, 1965, the day after the certificate became effective following dissolution by the three-Judge Court of its preliminary injunction.

The Commission also disposed of the one question raised on this appeal, namely, the "private line" argument, and held that if, in fact, this were a "private line", the Commission probably would have no jurisdiction over the matter at all,[12/] since Section 1(22) of the Act exempts such construction from Commission jurisdiction.[13/]

Following extensive briefs and oral argument before the three-Judge Court, the Commission's decision was affirmed by a *per curiam* opinion.[14/] The three-Judge Court, too, found the "private line" theory to be "without merit."[15/] After examining all arguments raised by Florida East Coast, the Court found: "We can reach no conclusion other than that the finding [public convenience and necessity] is supported by substantial evidence and the Commission's decision must be upheld."[16/]

12/*Atlantic Coast Line Railroad Company, Et Al. Construction*, 324 I.C.C. 286, 291-292 (1964).

13/49 U.S.C. §1(22). *"Construction, etc., of spurs, switches, etc., within State.* The authority of the Commission conferred by paragraphs (18) to (21) of this section, both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."
See *United States v. Idaho*, 298 U.S. 105, 80 L.ed. 1070 (1936), where this court held that a nine mile railroad track built to serve a single industry was a "spur track" over which the Interstate Commerce Commission lacked jurisdiction.

14/*Florida East Coast Railway Company v. United States*, 242 F.Supp. 490 (1965).

15/*Id.* pp. 490, 492.

16/*Ibid.*

ARGUMENT

The question presented to this Court, as stated by appellant, is whether the Commission, under Section 1(18) of the Interstate Commerce Act may authorize a railroad to construct an extended line to meet the desires of a single shipper when the public will be permitted to use the new line only with the consent of that shipper.

Both the Commission and the District Court considered this contention by appellant and found it to be without merit. They were both plainly right for several reaesons. The Commission said:

> "We do not agree with East Coast that the new line proposed by Coast Line would be a mere 'private line'. Duda is a corporation and Gressinger is a partnership. They conduct separate businesses and the fact that Gressinger may become a tenant of Duda at the latter's packing facilities does not in itself reduce it to the status of a subsidiary or affiliate of Duda . . . If the extension were, in fact, merely a 'private line', we would probably have no jurisdiction over the matter at all, since section 1(22) of the act exempts from our authority the construction of industrial lines located entirely within one State. There has been no contention that our jurisdiction herein is lacking on any ground."[17/]
>
> • • • • • • •
>
> "East Coast expresses concern at the prospect this truck-delivered traffic [vegetables] being diverted to Coast Line (and in this, it is not consistent with its contention that the Coast Line construction involves only a 'private line' not open to public use)."[18/]

17/*Atlantic Coast Line Railroad Company, Et Al. Construction*, 324 I.C.C. 286, 291-292 (1964).

18/*Id.* p. 294.

The District Court also found the "private line" theory to be "without merit", and said:

> "The Commission considered the 'private line' contention of the FEC and rejected it. This Court has also given consideration to the question and finds it to be without merit. It is true that the greater part of shipments over the northerly leg of the ACL extension will, at the outset, originate with Duda and consist of vegetables produced by it or by the members of the Duda Cooperative. But Gressinger & Sons, who will either use the Duda facility or erect one of its own, are substantial producers and will become substantial shippers on the ACL extension."[19/]

The record before the Commission clearly establishes that the Coast Line extension will not serve only Duda (Tr. 146-147). The testimony shows that Gressinger & Sons will use the new Duda packinghouse facilities, or Gressinger will construct its own packinghouse on the Duda property (Tr. 147, 190).[20/] Additionally, Duda is a marketing cooperative and

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19/*Florida East Coast Railroad Company v. United States*, 242 F. Supp. 490, 492 (1965).

20/Witness Colbert, testifying on behalf of Duda, was asked the following question:

> "Q. Have any arrangements or agreements been made looking toward the use of your facilities by anyone *not directly connected* with your company?
>
> A. Yes. We have been in contact with Mr. James Gressinger with the idea of making this proposed railroad available to him, either through the use of our facility or making land adjacent available to him in the event he wants to build his own. *In fact, we are making land available to anyone who needs it.*" (Emphasis supplied) (Tr. 147)

Mr. Gressinger testifying on behalf of the partnership said:

> " . . . plans are being made right now as to whether we can construct our own building or let Duda process our material [vegetables] for us" (Tr. 190).

its members will obviously have full advantage of the new packinghouse facility (Tr. 132-133). The record before the Commission also shows that Duda and Gressinger will ship more than 3,100 carloads of vegetables by the end of the fifth operating season, and they will receive inbound shipments of crate material, insecticides and fertilizer totaling more than 600 cars annually (Exhibit No. 2). These statistics alone negate the "private line" theory. The outbound shipments of vegetables go to destinations all over the country for the general public to consume as food. The inbound shipments of crate material, insecticides and fertilizers are produced by manufacturing companies in no way connected with Duda and Gressinger. Therefore, numerous suppliers of these materials will benefit from the line serving Duda and Gressinger. It is quite apparent then that the so-called "private line" theory advanced by appellant is "without merit".

Besides the fact that the evidence of record clearly refutes the appellant's "private line" argument, such argument also lacks a legal position. If, in fact, Coast Line's extension were a line to serve Duda and only Duda, it would be, as the Commission suggested, an industrial line exempt from Commission jurisdiction under Section 1(22) of the Interstate Commerce Act.[21/]

The Commission frequently authorizes a railroad to construct an extension to serve a *single* shipper. For example, the Commission, in *Louisville & N.R.Co. Construction, Fatty to Calhoun, Tenn.*, 312 I.C.C. 169 (1960), authorized a 9.1 mile extension of line to serve the Bowater Southern Paper Company; in *Chicago & N.W.Ry. Construction*, 312 I.C.C. 639 (1961), a 1.91 mile construction was authorized to serve Muir-

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21/49 U.S.C. §1(22). See footnote 13, *supra*.

son Label Company; in *Georgia R. Construction and Operation*, 320 I.C.C. 25 (1963), 10.2 miles of line were authorized to serve the Georgia Power Company; and in *Chicago, B. & Q. R. Co. Construction*, 282 I.C.C. 539 (1952), the Commission authorized construction of 2.77 miles of line to serve Electric Energy, Inc.[22/] In *Chicago, Rock Island & Pacific Railroad Company* v. *United States*, 205 F.Supp. 378, 382 (N.D. Ill. 1962), the District Court clearly stated that the public may be seen through a single shipper. It said:

> "When the statute refers to public convenience and necessity, it does not mean any one person that may be benefited at a particular locality, but it means the public generally, *even though that public may be seen only through a single person*, ..." (Emphasis supplied)

Duda is the "single shipper" appellant refers to in the question presented on appeal, and appellant insists that without Duda's consent no one else, including Gressinger, can use the new extension. This argument has no foundation whatsoever. Exhibit 1 in the case is a map which shows the location of the line and the property owners involved. This map also is appended to Coast Line's briefs before the Commission and the District Court. A casual glance at this map shows that except for the last few hundred yards, the new rail line does not even touch the Duda property. (See also Tr. 158, 170). Duda has absolutely no control over the property contiguous to the Coast Line's extension and Duda could not restrict the use of

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22/In *Atlantic Coast Line R. R. Co., et al. Construction*, Finance Docket No. 15335 (1947) (not reported), Coast Line, over Florida East Coast's opposition, obtained a certificate of public convenience and necessity to construct about 16 miles of track to serve the Okeelanta Sugar Mill, which is the point where the line involved in this case originates. No claim was made then (1947) by Florida East Coast that Coast Line was building a "private line" to serve the Okeelanta Sugar Mill.

this line if it wanted to. There is testimony of record by the adjacent property owner (Serralles) that land will be made available to shippers desiring to build facilities on the proposed line (Tr. 177, 184-185). To the extent Coast Line did not already have right of way for its extension, the Serralles interest, not Duda, provided the easements (Exhibits 12, 13, 14 and 15), and the Commission noted there was no corporate relationship between Duda and Serralles.[23/]

The Commission and the District Court, therefore, correctly disposed of appellant's "private line" argument as one "without merit."

CONCLUSION

It is plain that the question presented by this appeal has no factual or legal basis. First of all, the evidence conclusively shows that the line under construction by Coast Line will not and can not be restricted to the use of a single shipper, but assuming *arguendo* the line is for Duda only, it still is not a private line because Duda ships and receives thousands of cars of freight annually which benefit the public generally. Assuming even further *arguendo* that the public generally will not use the line under construction, then the construction becomes exempt from Commission jurisdiction pursuant to Section 1(22) of the Interstate Commerce Act. Finally, the Coast Line extension and the right of way for such extension is completely independent of the Duda interest, and Duda thereby has no control, direct or indirect, of the use of this line by others.

23/*Atlantic Coast Line Railroad Company, Et Al. Construction*, 324 I.C.C. 286, 291 (1964).

It is respectfully submitted, therefore, that appellant presents no substantial question for the decision of this Court, and the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

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October, 1965

Office Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NO. 541

FLORIDA EAST COAST RAILWAY COMPANY,

Appellant,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

MOTION TO AFFIRM

WILLIAM H. MANESS
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A. Duda & Sons, Inc., and
A. Duda & Sons Cooperative Association
Intervenors-Appellees

October 1965

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

MOTION TO AFFIRM

A. Duda & Sons, Inc., and A. Duda & Sons Cooperative Association (Duda), intervenors-appellees, pursuant to Rule 16(1) (c), Revised Rules of the Supreme Court of the United States, move that final judgment and decree of the District Court be affirmed on the ground that the question presented is so unsubstantial as not to need further argument.

This is a direct appeal from a final judgment entered May 19, 1965, by a District Court of three judges specially constituted pursuant to 28 U.S.C., Sections 1336, 1398, 2284 and 2321-2325, inclusive, dismissing an action brought by Florida East Coast Railway in the District Court of the United States for the Middle District of Florida, to enjoin, annul and set aside the enforcement of the order of the Interstate Commerce Commission, dated December 18, 1964, issued in ICC Finance Docket No. 22696, *Atlantic Coast Line Railroad Company Et Al. Construction,* reported, 324 ICC 286 (1964). The decision of the three-Judge Court, *per curiam,* is reported, *Florida East Coast Railway Company* v. *United States,* 242 F.Supp. 490 (1965).

In support of its motion to affirm, Appellees (Duda) adopt as grounds for their motion those advanced in the motions filed, or to be filed, by the Interstate Commerce Commission and Atlantic Coast Line Railroad Company, and in addition, they urge the grounds hereinafter set forth.

QUESTION PRESENTED

The only question presented by the appeal, as set forth in the Jurisdictional Statement, is as follows:

> May the Commission, under section 1(18) of the Interstate Commerce Act, authorize a railroad to construct an extended line of railroad to meet the desires of a single shipper when the public will be permitted to use the new line only with the consent of that shipper?

STATEMENT

Duda adopts by reference the Statement of the Case as set out in the motions filed, or to be filed, by the Commission and the Coast Line. In addition, Duda points out that it is one of the shippers to utilize the Coast Line's extension and that such extension is urgently needed for the orderly mar-

keting of vegetables (Tr. 146).[1] The record also shows that Duda and Gressinger, although separate business enterprises have a close working relationship and frequently interchange produce, and that Gressinger will use the new Duda packing-house facility or construct its own adjacent thereto on land supplied by Duda (Tr. 147, 190, 205-206). The record further shows that Duda will make "land available to anyone who needs it" in order that they might use the Coast Line extension (Tr. 147).

Duda supported the Coast Line application voluntarily, but really had no alternative. Five years prior to asking Coast Line to extend its rails to serve the proposed packing-house and pre-cooling plant to be constructed several miles south of Belle Glade, Florida, Duda sought the services of Florida East Coast (Tr. 137).[2] At that time the congestion and fire hazards in Belle Glade made it imperative that Duda relocate (Tr. 136). But Florida East Coast refused to build the requested line (Tr. 137-139). When operating conditions in Belle Glade became absolutely intolerable, Duda was

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[1]Witness Colbert summarized Duda's needs by stating:

"It boils down to the fact that if we are to serve our customers, the public, in an efficient manner, we must have the proposed railroad facilities." (Tr. 146). Then he stated, ". . . our previous answer certainly indicates how mandatory we feel rail service is to the marketing of our vegetables." He stated that Duda requested Coast Line to build the railroad as quickly as possible, and concluded by saying, ". . . I would like to again emphasize that we need better service and better facilities for our operation than we now have. We need this very quickly and most certainly and respectfully ask the Commission for an early decision in this matter." (Tr. 148-149).

SEE ALSO APPENDIX A herein for affidavit of this same witness filed before the three-Judge Court in support of Duda's Application to Intervene, which details the progress of construction of Duda's new facilities as of January 21, 1965; and Duda's irreparable harm.

[2]Even the Coast Line first appealed to East Coast by letter dated May 22, 1958 (see Appendixes B and C herein) and declared that no objection would be offered if the East Coast would act. But no action was taken by East Coast until after Coast Line acted July 10, 1963.

forced by economic necessity to make plans to relocate and asked Coast Line to obtain a certificate from the Commission permitting it to extend its Okeelanta Branch to the new facility. Coast Line filed the requested application (Tr. 148-149), and then two months later Florida East Coast filed its application to build a line to the Duda property.

On December 11, 1963, less than one month after the hearings were concluded, the coup de grace fell upon Duda. Its facilities at Belle Glade were destroyed by fire. Now, in order to expedite the proceeding, Coast Line, on December 27, 1963, filed petition with the Commission to omit the Examiner's report, and have the case decided initially by Division 3. On January 2, 1964, Florida East Coast filed a reply opposing omission of the Examiner's report and by order of the Commission, served January 21, 1964, the Coast Line's petition was denied. The case then had to run the usual administrative time lag and Duda was forced to take positive steps, notwithstanding the risk involved. The affidavit filed by Duda in opposition to the preliminary injunction before the three-Judge Court (Appendix A) shows that Duda did not begin to make plans to construct the new packinghouse facility until immediately following the Examiner's report of March 13, 1964, recommending that Coast Line be issued a certificate of public convenience and necessity to construct the proposed line of railroad. Then, following the Commission's report of December 18, 1964, favorable to the Coast Line's construction, Duda actually commenced construction of its facility at the site planned for the Coast Line's extension. The precooling plant and packing facility will be ready for full operation when the coming vegetable season opens in November 1965, and rail service to and from that facility is so essential for orderly marketing of produce that Coast Line began construction immediately after the preliminary injunction was vacated.

Purely and simply, this is a matter of two shippers (Duda and Gressinger) moving from obsolete facilities on one railroad to new facilities on another railroad, with the former railroad trying to deny these shippers rail service. Florida East Coast obviously, as the record shows, never has demonstrated any real interest in Duda, nor a valid intention to construct a line of track to the Duda property (Tr. 137-139), and Duda cannot afford the irreparable harm and economic handicap that would come to it if Coast Line's track is not in place and ready to receive traffic by November 1965. (Tr. 141, 145-146).

ARGUMENT

Out of the several questions raised below, the Florida East Coast by this appeal raises only the *contention* that the line will serve only Duda and that neither Gressinger nor anyone else can use the line without Duda's consent. This "private line" argument ignores the plain facts. The record shows that Gressinger & Sons, a partnership, will use the new Duda facility or construct its own facility adjacent thereto (Tr. 147, 190). The record also shows Duda will make land available to anyone who needs it, if Duda property is required to make use of the line (Tr. 147). The map (Appendix D herein) which has been used throughout this proceeding shows that the line of railroad tracks and right-of-way are wholly on the property to the west of Duda's land until it reaches the plant site.

The argument that Duda is a single shipper and no one but Duda can benefit from the line is without substance. Duda is a marketing cooperative of vegetables and produce. The form of the association indicates it is not a single shipper. The very nature of that business means that the public generally deals with Duda and enjoys the use of such facilities. Duda also is a farming corporation and as such receives hundreds of cars of freight inbound annually from

numerous producers of crate material, insecticides and fertilizer manufacturers. If it were true that Duda is a single shipper and the line under construction by Coast Line is a private line, this cause would not be here.

Furthermore, as mentioned above, except for the extreme terminus of the line, none of the Coast Line's extension is even on Duda property. Duda cannot control the use of this line by others. Even if Duda had such selfish desires, the power of eminent domain would give the Coast Line the dominant right to acquire right-of-way to serve others. Actually, the first two and one-half miles of the line is located on right of way owned by Coast Line (Exhibit No. 15) and the balance of the six miles of right of way to the Duda plant was provided by the Serralles interest (Exhibit Nos. 12 and 13). Mr. Serralles testified that land would be made available to other shippers desiring to build on the proposed line (Tr. 177, 184-185). Duda has no ownership or control whatsoever over the property traversed by the Coast Line extension until it reaches its northern terminis and no ownership or control over the rich sugar cane land to the south that must necessarily be devoted to production of some product using rail service.

CONCLUSION

The question stated by Florida East Coast for review by this Court presents no issue of fact or law which warrants further consideration by this court. Florida East Coast, for a number of reasons found by the Commission, cannot provide Duda and Gressinger with their badly needed rail service. Both the Commission and the District Court, acting within the jurisdiction conferred by law on each, fully considered the "private line" and single shipper argument and found such argument lacked merit in law and in fact. It is manifest, therefore, that the question presented by this appeal is so unsubstantial as not to need further argu-

ment in this Court, and that this appeal is taken solely for delay and harrassment.

It is respectfully submitted, therefore, that appellant presents no substantial question for the decision of this Court; that the equities of this case are overbalanced in favor of the opinion below; and that the question presented is so wholly without merit that the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

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COUNSEL FOR
A. Duda & Sons, Inc., and
A. Duda & Sons Cooperative Association,
Intervenors-Appellees

October 1965.

APPENDIX A

AFFIDAVIT

(Supporting Application to Intervene, Opposing Interlocutory Injunction and Supporting Motion for Bond).

STATE OF FLORIDA:
COUNTY OF DUVAL:

(EXHIBITS MENTIONED HEREIN HAVE BEEN OMITTED IN THIS APPENDIX)

I, JAMES D. COLBERT, being first duly sworn, make this affidavit for the purpose of supporting the Application of A. Duda & Sons, Inc., a Florida corporation, and A. Duda & Sons Cooperative Association, a cooperative association organized and existing under the laws of Florida (the said corporation will be referred to herein as "Duda Corp." and the said Cooperative will be referred to herein as "Duda Co-op;" collectively, they will be referred to as "Duda") to intervene in this cause and for the further purpose of opposing plaintiff's motion for interlocutory injunction and for the further purpose of supporting Duda's motion for bond in the event said interlocutory injunction should be issued:

1. *ASSISTANT TO PRESIDENT:* I am James D. Colbert and my address is Route 1, Box 99, Oviedo, Florida. For more than 19 years I have been employed by the "Duda" interests and for the past eight years I have been assistant to Mr. Andrew Duda, Jr., President of A. Duda & Sons, Inc., and A. Duda & Sons Cooperative Association, and my duties are intimately connected with the business affairs of both the "Duda Corp." and "Duda Co-op". I am the same

James D. Colbert who testified before Paul C. Albus, ICC Examiner, on Wednesday, November 13, 1963, at West Palm Beach, Florida, at the hearings held in the matter now before this Court (pages 131-170 of Stenographers' Minutes, hereinafter referred to by symbol "R").

2. *"DUDA CORP.":* "Duda Corp." is a Florida corporation and is engaged in the *production* of vegetables, including celery, sweet corn, cabbage, potatoes and salad greens, such as endive, escarole, romaine, etc. It also *produces* sugar cane and citrus and produces and markets cattle. In these proceedings, our vegetable operation at or near Belle Glade, Florida, is the subject of this affidavit as it relates to rail service (R. 132-135).

3. *"DUDA CO-OP":* "Duda Co-op" is a cooperative association under the laws of Florida, more than 90% of which is owned by "Duda Corp.", and as such cooperative is engaged in harvesting, processing, packaging and marketing of vegetables for "Duda Corp." and others (R. 133).

4. *SCATTERED OPERATIONS:* In November of 1963, and for many years prior thereto, "Duda Co-op" was using as its primary facility a pre-cooler plant in Belle Glade, Florida, which it leased from Florida Pre-Cooler, Inc., but which had long been inadequate for "Duda Co-op's" total operation, so that part of its processing had been diverted to other plants (R. 135).

5. *BELLE GLADE "OUTGROWN":* Because of our continued expansion and the increasing inadequacy of the Belle Glade facilities, rail and truck congestion, risk of fire, outmoded processing equipment, economic waste, excessive handling costs and other factors of inefficiency and expense (R. 135-136), the decision was made about 1955 for "Duda Co-op" to construct its own processing and pre-cooling plant at the Belle Glade Farm. "Duda Corp.'s" Belle Glade farm has now grown to 9,100 acres of which 5,100 acres are de-

voted to vegetables and the remainder to sugar cane; and an additional 5,760 acres of leased muckland are being developed, part for vegetables and part for cattle (R. 134).

6. *FEC NO HELP:* About 1958 we contacted officials of the Florida East Coast Railway for the purpose of obtaining rail service at our Belle Glade farm to enable "Duda Co-op" to build our plant there, but we were unsuccessful (R. 137-139) so we later sought help from the Atlantic Coast Line Railroad Company (R. 148-149).

7. *FEASIBILITY STUDY—SUGAR CANE ROUTS VEGETABLES—SITE PICKED:* In early 1963 we engaged George Fry and Associates to do a feasibility study of a proposed cooler installation to be located at our Belle Glade farm. By this time the market for and our entry into sugar cane production caused the displacement of vegetables previously grown north of Bolles Canal and we moved farther south on our farm into the Everglades and developed additional acreage for the production of vegetables (R. 141). This movement of the vegetable farming to the south was an additional factor that made the early construction of our own plant mandatory and we prevailed upon the Coast Line to make application to the Interstate Commerce Commission for permission to extend its Okeelanta Line to a location on the *western edge* of our Belle Glade farm, as will more fully appear from a map attached hereto and made a part hereof as Exhibit A.

8. *COAST LINE ONLY HOPE:* At the request of "Duda", Coast Line filed its application on July 10, 1963, for permission to serve "Duda Co-op" and others and we have supported this application because it would, in our opinion, serve our needs best and seemed to be *our only chance* for rail service which is most essential in the orderly marketing of vegetables and produce (R. 135, 145-146).

9. *NEW PLANT FEASIBLE:* On September 11, 1963, George Fry &.Associates completed their study and report and advised us that with our own plant we could effect a tangible savings of one cent per crate (in addition to many more intangible savings) and that the proposed plant and pre-cooler could be paid for in from 10 to 15 years. This represented a $25,000 per year savings in processing alone.

10. *SECOND SITE PICKED:* On September 13, 1963, the Florida East Coast filed its application with the Interstate Commerce Commission to extend its tracks to a point we selected as a second site, on the *east side* of our Belle Glade farm (see Exhibit A).

11. *COAST LINE PREFERRED:* Although we picked a site on the east side of our farm for the location of our plant, in the event the application of the FEC was approved and the Coast Line's application was denied, we supported the Coast Line at the hearings held as aforesaid on November 12-15, 1963, at West Palm Beach. The Coast Line service was and is our preference.

12. *FIRE COMPELS CHOICE OF SITE:* However, on December 11, 1963, the primary facilities we leased in Belle Glade were destroyed by fire and this made more urgent our decision to make a choice between the site selected for Coast Line service and the site selected for FEC service, since we did not want the tracks of either railroad to bisect our farm. The decision to build a new plant had been made definite in September 1963 and only the final choice of the site remained. Despite our preference for Coast Line, we delayed further action until after the Report, Certificate and Order recommended by the Hearing Examiner was filed on March 13, 1964. Since this Report was wholly in favor of the Coast Line's application and wholly unfavorable to the FEC application, we determined that we could delay no longer in making a final site choice. We decided to move

ahead with the construction of our new facilities at a site on the west adjacent to the proposed Coast Line right of way; and, because of further expansion to the south actually picked a location about 1½ miles south of our first designated location (as shown on Exhibit A) and we have now located the facility as shown on Exhibit C attached hereto, still further south of Bolles Canal.

13. *STATUS OF CONSTRUCTION:* The design and engineering of our new plant follows that generally described in the feasibility study of George Fry and Associates, copy of which will be offered in evidence. The "Duda Co-op" is acting as its own "prime contractor". The plans, drawings and specifications are under the supervision of Lakeland Engineering Associates, Inc., of Lakeland, Florida. A copy of the plans and specifications prepared to date will be offered in evidence. As of January 15, 1965, a progress report has been furnished by Lakeland Engineering Associates, Inc., copy of which is attached hereto as Exhibit B. As will more fully appear from said report, the construction site has been prepared and is now ready for the construction of the footings of the Pre-Cooler Complex. To January 13, 1965, approximately $58,322.57 has been expended by "Duda Co-op" for labor and equipment in preparation of said site for construction; and $40,915.42 for engineering fees, compaction tests, dynamite, dump truck rental and incidental expenses. In addition, one contract for $56,868 for construction and installation of Vacuum Retorts in the Pre-Cooler has been awarded and another contract for $363,825.10 for refrigeration was awarded January 20, 1965. Bids for other major work are due to be received January 28, 1965, and the remaining plans and specifications are nearly complete. The exact charges for other materials and services to date are not known, but "Duda Co-op" is well past the "point of no return" in the expenditure of more than one and a half millions of dollars for the new facilities

now under construction on the Coast Line site. These facilities will be completed no later than October 31, 1965, in time to be utilized for the 1965-1966 vegetable season and these facilities will be used in the harvesting, processing and marketing of the 1965-1966 crop.

14. *COST AND DAMAGE OF DELAY:* "Duda Co-op" had the assurance of Coast Line engineers that the rail facilities could be constructed in 12 months and even now is reassured by Coast Line that if construction can be commenced by February 1, 1965, that every effort will be made to complete the rail facilities by October 31, 1965, in time to provide rail service for the 1965-1966 crop. If such rail facilities are not completed and available the "Duda Co-op" and the members thereof, including "Duda Corp.", will suffer irreparable harm and damages by reason of the additional costs and expenses involved in trucking vegetables and produce to a railhead for loading.

The added cost and expense which "Duda Co-op" and ultimately "Duda Corp." will incur and suffer can be accurately estimated by reason of studies made of the cost of extra handling of crates during the FEC strike. Based on these studies, made under my supervision, and my own knowledge of our operations, the added cost and expense of *extra* handling of the 1965-1966 vegetable crop, if no rail facilities are available at our new processing plant and crates are trucked to Lake Harbor for rail loading, is $157,720 for 1900 carloads.

This figure is arrived at as follows:

(a) Use of 3 semi-trucks, with 10 refrigerated vans, gasoline, tires, maintenance and service costs, and drivers	$72,600.00
(b) Extra loading crews at railhead, extra ice, extra crew trucks and the operation thereof, and incidentals	85,120.00
	$157,720.00

These estimates make no allowance for the cost of accidents, added expense of supervision of widespread operations, extra bruising and loss of vegetables, as well as loss of consumer appeal, added complaints and adjustments, deprivation of benefits anticipated from inbound delivery by rail of fertilizer, insecticides, crate material, heavy agricultural equipment (we are an Allis Chalmers distributor, but we are also our own best customer) and other supplies; and the added expense is based on only *1900* carloads instead of 1966 estimated by FEC as the average shipments for five years.

15. *RAIL SERVICE VITAL PART OF NEW FACILITY:* To achieve the full advantage of the careful study and planning that has gone into the design and engineering of the "Duda Co-op" pre-cooler-complex rail service is vital. When the new facility opens in November 1965, an entirely new concept of harvesting, handling, pre-cooling and marketing will be put into operation. All handling from the ground to the customer will be mechanical; vegetables will be graded and packaged in the field and the crates of uniform grades and sizes will be assembled there in special loading patterns for handling by clamp-lifts that are gentle enough to handle eggs; mechanized equipment will place these unit loads in the most modern and efficient pre-coolers known to the industry, with a choice between *hydro-cooling* and *vacuum cooling*, depending on the particular vegetable and customer preference; and, after pre-cooling, refrigerated storage is provided until an order is received and shipment required.

The full benefit and value of all this careful work will be lost and dollars sacrificed if crates must be transported by truck to a railhead in car load or less than car load lots and moved by hand from truck to refrigerated railroad cars. As shown by Exhibits E and F attached hereto, rail service has been designed into and is an inseparable part of our entire complex and operation.

16. *FEC SHOULD DELAY NO MORE:* As will more fully appear from the record in this cause, we feel the FEC could not, or would not, and did not take advantage of its opportunity to provide the service we need. "Duda's" interests have made the best arrangements that could be made for its operations while the Interstate Commerce Commission spent 13 months processing Coast Line's application in the interest of all concerned, except "Duda", which interest had to be held in a state of "limbo" until circumstances forced it to act for its own protection. If, after all this time has passed, the FEC cannot agree with the determination of the ICC, further delay should not be at "Duda's" expense for delay is dollars lost forever to "Duda" and the least amount one season's delay will cost "Duda Co-op" and ultimately "Duda Corp." is $160,000.00.

JAMES D. COLBERT

Sworn to and subscribed before me
this 21st day of January, A. D. 1965.

APPENDIX B

Wilmington, N. C., May 22, 1958

Mr. J. Turner Butler, Trustee,
Florida East Coast Railway,
Florida Title Building,
Jacksonville, Florida

Dear Sir:

A. Duda & Sons, home office Slavia, Fla., owns approximately twelve sections of farm land in Palm Beach County which at the nearest point are located some four miles from Florida East Coast Railway in vicinity of South Bay, Fla.

On a number of occasions during recent years A. Duda & Sons has expressed interest in having Coast Line provide rail service to its property in Palm Beach County and only within the past week or so has brought up the subject again. The nearest point on Coast Line to the Duda property is stub-end of our Okeelanta Branch, and a track extension of approximately eight miles would be necessary, whereas only about four miles would be involved should a track extension be made from FEC. I am sure you are familiar with the application of both Coast Line and FEC to construct a line of railroad to serve the sugar mill at Okeelanta, Fla., and of the Commission's decision in Finance Docket 15335, decided August 25, 1947, under which Coast Line was authorized to construct a line of railroad to serve the sugar mill at Okeelanta and FEC's application was denied. In authorizing Coast Line to construct branch line extension to serve the sugar mill at Okeelanta, the Commission at the same time denied Coast Line the right to construct the branch easterly from the site of the sugar mill at Okeelanta to a point on U.S. No. 25 approximately two miles in length. As FEC Railway

trackage is much nearer the Duda property than is Coast Line trackage, Coast Line would offer no objection to the construction of a track by FEC to serve the Duda property. If FEC Railway is not interested in constructing such a track, I shall be glad if you will let me know whether FEC will offer any objection should Coast Line enter into negotiations with A. Duda & Sons with view of constructing a track to serve the Duda property.

Your advice in this respect will be appreciated.

Very truly yours,

W. T. RICE
President

I.C.C. F.D. 22696.
Exhibit 3

APPENDIX C

P. O. Box 1259
Jacksonville 1, Florida

June 3rd, 1958
File 15670

Okeelanta Branch —
A. Duda & Sons.

Mr. W. Thomas Rice, President
Atlantic Coast Line Railroad Company
Wilmington, North Carolina

Dear Mr. Rice:

I have yours of May 22nd with reference to the question of the construction of a line of railroad in Palm Beach County to reach a large area consisting of twelve sections of farm land belonging to A. Duda & Sons.

Since receipt of your letter we have had some preliminary advice from our people with reference to this project which was under consideration several years ago at which time we understand the Duda interests approached the Coast Line as well as the Florida East Coast relative to constructing this branch line. The project apparently has not been urged but we understand the Duda's are now anxious to have a decision as to what the Atlantic Coast Line is willing to do and you inquire as to what the attitude of the Florida East Coast would be either as to the construction of the line or opposition to the Coast Line doing so. As stated above, this is a new project about which we have only preliminary information but on the basis of what information we have we believe it will be to the interest of the Florida East Coast

to provide this short spur track and unless you hear to the contrary, after we have more information, we will arrange to do so.

Yours very truly,

J. TURNER BUTLER AND WILLIAM A. HALLOWES, *Trustees*

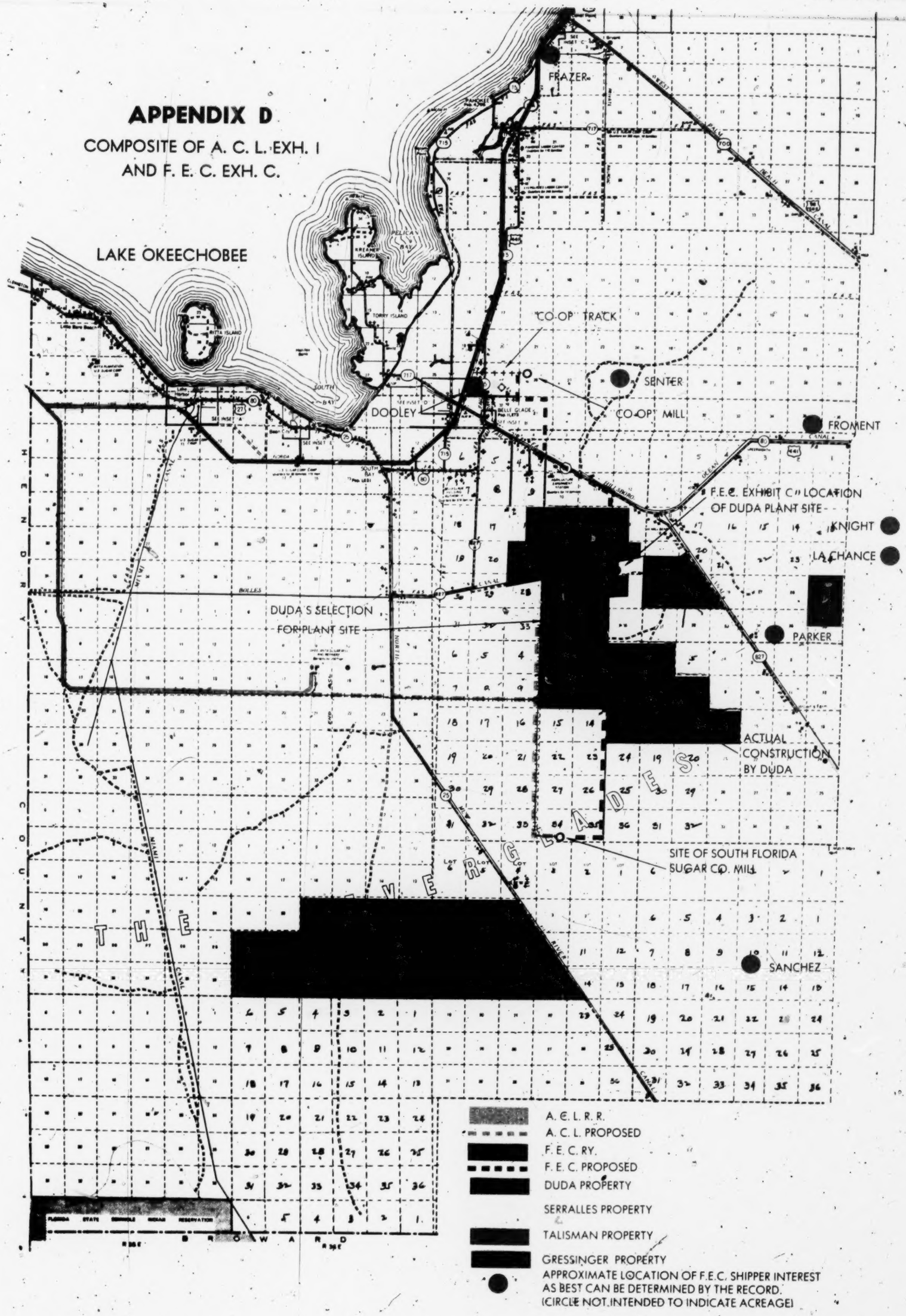
By

J. Turner Butler

I.C.C. F.D. 22696
Exhibit 4

APPENDIX D

COMPOSITE OF A. C. L. EXH. I
AND F. E. C. EXH. C.



In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 541

FLORIDA EAST COAST RAILWAY COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA AND
THE INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment (242 F. Supp. 490) of a three-judge district court dismissing an action brought to set aside an order of

the Interstate Commerce Commission. The order granted the Atlantic Coast Line Railroad Company (Coast Line) a certificate of public convenience and necessity to construct a rail extension in Palm Beach County, Florida, and denied an application of the Florida East Coast Railway Company (East Coast) to construct a rail extension in the same county.

A. Duda & Sons and A. Duda & Sons Cooperative Association (collectively, Duda) and Gressinger & Sons (Gressinger), both vegetable producers, have until now shipped their produce on East Coast from a terminal in Belle Glade. As a result of the development of a new vegetable producing area in Palm Beach County, and the unsatisfactory condition of the facilities and service at Belle Glade, these shippers determined to move their shipping facilities into the new territory (J.S. 6b). After unsuccessful negotiations with East Coast (J.S. 7b), Duda approached Coast Line, which applied to the Commission (under Section 1(18) of the Interstate Commerce Act) for a certificate of public convenience and necessity to extend its existing lines into the new territory. The extension was projected to have a northern and a southern branch. The northern branch would terminate at the site of a proposed new vegetable packinghouse and pre-cooling plant of Duda; Gressinger proposed either to use the new Duda facilities or to construct its own packinghouse on the Duda property at this point (J.S. 26b). The southern branch would terminate at the site of the existing sugar mill of the South Florida Sugar Company (Serralles). East

Coast opposed Coast Line's application and applied for its own certificate to construct a rail extension for the same shippers. Duda and Gressinger supported Coast Line's application.

After hearings, the Commission found that (1) because of the recent growth of vegetable production in the area, the public convenience and necessity required an extension of a rail line into it (J.S. 7b) but (2) justified issuance of a certificate to only one of the two applicants (J.S. 8b-9b); (3) East Coast was currently unable to carry out its proposal and build an extension within a reasonable period of time (J.S. 9b); (4) Coast Line was financially and otherwise prepared to carry out its proposal (J.S. 12b, 33b); and (5) certifying Coast Line to serve the new area would not disturb the competitive positions of the parties since, among other things (*a*) East Coast would have lost the traffic shifting to the new area regardless of the certification of Coast Line (J.S. 6b, 7b), and (*b*) East Coast would gain some traffic in sugar to compensate for the vegetable traffic it would lose in the relocation of Duda and Gressinger (J.S. 12b, 13b). The Commission certified Coast Line.

East Coast petitioned the three-judge district court below to set aside the Commission's order. On the day set for oral argument, East Coast reported to the court that the mill of South Florida Sugar, which was to be served by the southern branch of the proposed Coast Line extension, was to be dismantled and that there would now be no use for the southern branch. East Coast thereupon (1) moved the court to remand the proceedings to the Commission to con-

sider the effects of this change in circumstances upon its original order, and (2) petitioned the Commission to reopen the case. The Commission denied the petition, finding that even without South Florida as a shipper, "the public convenience and necessity require a rail extension since Coast Line's proposed extension will reach two shippers which require rail service," and "that the area in question is being developed and rail service is necessary for future requirements as well as to meet the immediate present needs of the two shippers involved" (J.S. 2c). It further held that the elimination of the third shipper would not alter its prior decision that East Coast was unqualified to construct its proposed extension within a reasonable time (J.S. 2c). The three-judge court affirmed both the Commission's decision not to reopen the proceeding and its decision to certify Coast Line.

ARGUMENT

The sole question presented in the jurisdictional statement is, in point of fact, not raised by the facts of this case. The question is whether the Interstate Commerce Commission may authorize the construction at railroad expense of a "private line" (J.S. 9) for the benefit of a single shipper, Duda. It is clear, however, that the rail extension which the Commission has certified Coast Line to build is *not* a private line and will benefit other shippers besides Duda.[1]

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[1] Even if it were designed to provide rail service to only one shipper, that would plainly *not* preclude grant of a certificate of public convenience and necessity. See, *e.g.*, *Chicago, Rock*

1. The court below found that, besides Duda, Gressinger would use the extension: "Gressinger & Sons, who will either use the Duda facility or erect one of its own, are substantial producers and will become substantial shippers on the A C L extension" (J.S. 3a). For, as the Commission found, "Duda approached Gressinger about a year and a half ago offering Gressinger the use of the new Duda facilities or Gressinger could construct its own packinghouse on the Duda property at this point. Gressinger and Duda have a close working relationship, their sales organizations cooperated and work together, and the two concerns frequently interchange produce" (J.S. 26b). It may be, as appellant suggests (J.S. 9), that Duda *could* block Gressinger from access to the Coast Line extension, but this is a remote and unlikely eventuality which does not confer a private character upon the extension.

2. More important, there are other potential users of the Coast Line extension besides Gressinger—users whom Coast Line, as a common carrier, could not refuse service to and whose access to the extension Duda could not conceivably block. At most, Duda could control access to the line only from one side of the northern branch. Serralles owns the property on the other side of the northern branch and on both sides of most of the remaining portion of the line; and there is no corporate relationship between Serralles and

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Island & Pacific Railroad Co. v. *United States*, 205 F. Supp. 378 (N.D. Ill.).

Duda (J.S. 8b). The needs of potential shippers were an important factor in the Commission's decision to authorize the rail extension: "the area in question is being developed and rail service is necessary for future requirements as well as to meet the immediate present needs of the two shippers involved" (J.S. 2c). The Commission's emphasis on the future requirements of other shippers negates the contention that the Commission was authorizing a private line.

CONCLUSION

It is respectfully submitted that the judgment of the court below should be affirmed.

THURGOOD MARSHALL,
Solicitor General.

DONALD F. TURNER,
Assistant Attorney General.

ROBERT B. HUMMEL,
Attorney.

ROBERT W. GINNANE,
General Counsel,

RAYMOND M. ZIMMET,
Attorney,
Interstate Commerce Commission.

OCTOBER 1965.

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STATUTES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 541

FLORIDA EAST COAST RAILWAY COMPANY, *Appellant*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*.

On Appeal from the United States District Court for the Middle District of Florida

APPELLANT'S REPLY TO MOTIONS TO AFFIRM

Appellees urge that the judgment below be summarily affirmed.

There are elemental differences between the bases for affirmance put forward by the United States and by the Atlantic Coast Line Railroad and A. Duda & Sons. According to the United States, there is no factual basis for the question whether an extended line of railroad serving a single shipper may be lawfully authorized by the Commission. Alternatively and hypothetically, the United States asserts in a footnote that

the Commission may nevertheless authorize such an extension (Motion, pp. 4-5, n. 1). Coast Line and Duda argue in separate motions that the line is not for the "private" benefit of Duda but, even if it were, the Commission may either dismiss the application for lack of jurisdiction or assume jurisdiction and authorize construction.

All of the Motions to Affirm rest on fundamentally erroneous propositions of fact and of law.

I. COAST LINE'S EXTENSION IS "PRIVATE" AS A MATTER OF FACT

Appellees rely—as did the Court below and the Commission—on Gressinger & Sons as an additional shipper from the Duda plant site. The claim that Gressinger is certainly a potential user of the line flatly contradicts the evidence. Gressinger had made no definite plans to use the line at the time of hearing and in fact had recently moved into new facilities, including improved rail siding facilities, at Belle Glade (Tr. 198).[1] Whether or not Gressinger chooses to move to Duda's plant site, the essential fact remains that Duda will determine whether and under what terms Gressinger may have access to the Coast Line extension (Tr. 159, 197-198). The United States concedes this vital fact (Motion, p. 5). Having conceded the fact, the United States nevertheless attempts to find potential public use of the line at points where the line traverses the property of Serralles. The Commission

[1] United States compounds error (Motion, p. 5) by relying upon the Commission's clearly erroneous finding that Duda approached Gressinger about the move as a natural result of their close working relationship. The record shows that Gressinger was approached and the move was solicited in the first instance by Coast Line (Tr. 197).

never found, however—and it was never claimed by Coast Line—that the line would be used at points other than Duda's precooling and packing plant and the now-abandoned Serralles sugar mill. The vague, general statement of public use relied upon so strongly by the United States (Motion, pp. 4, 6) first appeared in the Commission's order denying reopening and reconsideration—and that order was entered while judicial review was underway in the District Court and after it had become apparent that Serralles, one of two shippers to be served, had sold its sugar mill to a buyer who intended to dismantle the facility.[2] There is no scintilla of evidence that the line would be useful to anyone but Duda; the evidence is that public access to the line over Serralles land would not have been permitted (Tr. 185).

The United States does not join Coast Line and Duda in contending that "public" use of the line may be inferred because consignees of Duda traffic and suppliers shipping inbound "need" this extension.[3] This argument ignores obvious facts: Consignees presently receive Duda's produce via East Coast; suppliers presently reach Duda with inbound shipments via East Coast; not one of Duda's suppliers or receivers appeared to testify that the Coast Line construction would

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[2] In the order of April 21, 1965, denying East Coast's petition for reopening and reconsideration in view of this development, the Commission found "that the area in question is being developed and rail service is necessary for future requirements as well as to meet the immediate present needs of the two shippers [Duda and Gressinger] involved" (J.S. App. C, p. 2c).

[3] Coast Line and Duda also speculate on benefits to members of the Duda marketing cooperative (Motions, pp. 8-9; 5). The record discloses no member of this cooperative other than Duda and another corporation owned by Duda (Tr. 133).

be a convenience, much less a necessity. No finding or discussion of such indirect public need is found in the Commission's report. "The Courts may not accept appellate counsels' *post hoc* rationalizations for agency action . . . ." *Burlington Track Lines* v. *United States*, 371 U.S. 156, 168 (1962).

The conspicuous absence of public support for the Coast Line extension is merely emphasized by the cases[4] appellees cite for the proposition that a single shipper's desire for service may be equated with *public* convenience and necessity. In each of the cases cited, there was specific evidence of benefits to particular (and plural) shippers or receivers of freight. For example, in *Chicago, Rock Island, supra* (cited by both the United States and Coast Line), the court held, after careful examination of the record and after noting that private desires were not synonymous with public need:

> The most important evidence is that found in the testimony of a number of witnesses, which indicates that the superior service of North Western will not only meet the needs and the convenience of the Muirson Paper Plant, but will fill the same general need existing in the Park as a whole for encouragement in its program of developing diversified industry. 205 F. Supp. at 384.

No evidence of public need exists in this record to support any finding of public use. This landlocked

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[4] *Louisville & Nashville Railroad Company, Construction*, 312 I.C.C. 169 (1960); *Chicago & North Western Railway Company, Construction*, 312 I.C.C. 639 (1961); *Georgia Railroad, Construction and Operation*, 320 I.C.C. 25 (1963); *Chicago, Burlington & Quincy Railroad Company, Construction*, 282 I.C.C. 539 (1952); *Chicago, Rock Island & Pacific Railroad Company* v. *United States*, 205 F. Supp. 378 (N.D. Ill. 1962) [affirming 312 I.C.C. 639, *supra*.].

line of railroad will be inaccessible to the general public.

II. THE COMMISSION'S JURISDICTION

Coast Line and Duda now argue, on the one hand, that a single shipper's desire for service is equivalent to public convenience and necessity but, on the other hand, that no showing or finding of public convenience and necessity is required to justify construction of a line to serve a single shipper. The United States does not join Coast Line and Duda in this contention that the private-line issue can be evaded by treating the line as a private spur not subject to the Commission's jurisdiction under section 1(22) of the Interstate Commerce Act, 49 U.S.C. §1(22).

This Court discussed private spurs in *Texas & Pacific Railway Company* v. *Gulf, Colorado & Santa Fe Railway Company*, 270 U.S. 266 (1926):

> Tracks of that character are commonly constructed, either to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, who being within the same territory and similarly situated are entitled to like service from the carrier. The question whether the construction should be allowed or compelled depends largely upon local conditions, which the state regulating body is peculiarly fitted to appreciate. Moreover, the expenditure involved is ordinarily small. 270 U.S. at 278.

Coast Line does not propose construction of a private spur. Coast Line does not now serve Duda; indeed, East Coast has handled Duda's outbound traffic since at least 1954. Coast Line has not constructed private spurs for other shippers in the territory and has indi-

cated no intention to do so.[5] Moreover, the cost of constructing Coast Line's extension is substantial.

Under the criteria of *Texas & Pacific, supra,* Coast Line's proposed construction is an extension that may be justified only by proof of *public* convenience and necessity. The Commission's erroneous application of appropriate statutory criteria is a threat to every railroad whose shippers are subject to capture by the techniques Coast Line has employed in this case. Summary affirmance of the judgment below would perpetuate the threat.

Respectfully submitted,

A. ALVIS LAYNE
WILLIAM A. CHESNUTT
Pennsylvania Building
Washington, D. C.

FRED H. KENT
Florida National Bank Building
Jacksonville, Florida

Attorneys for Appellant,
Florida East Coast Railway
Company

October 1965

[5] Compare and contrast East Coast's position that a line to serve only Duda should be built at Duda's expense, as East Coast had required the Sugar Growers' Cooperative Association to pay for a private line in the same area (Tr. 139). The Commission treats this position of East Coast as indicative of a refusal to serve Duda, but this Court has treated shipper contribution to construction costs as a natural incident of private spurs. See *United States* v. *Idaho,* 298 U.S. 105 (1936).